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REPORT

ON

CLASS ACTIONS

ONTARIO LAW REFORM COMMISSION

VOLUME III

Ministry of the
Attorney
General

1982

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REPORT

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CLASS ACTIONS

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1982

The Ontario Law Reform Commission was established by the *Ontario Law Reform Commission Act* for the purpose of reforming the law, legal procedures, and legal institutions. The Commissioners are:

DEREK MENDES DA COSTA, Q.C., LL.B., LL.M., S.J.D., LL.D., *Chairman*

H. ALLAN LEAL, Q.C., LL.M., LL.D., *Vice Chairman*

HONOURABLE RICHARD A. BELL, P.C., Q.C.

WILLIAM R. POOLE, Q.C.

BARRY A. PERCIVAL, Q.C.

M. Patricia Richardson, M.A., LL.B., is Counsel to the Commission. The Secretary of the Commission is Miss A. F. Chute, and its offices are located on the Sixteenth Floor at 18 King Street East, Toronto, Ontario, Canada M5C 1C5.

W30537

During the course of the Class Actions Project, the Honourable G. A. Gale, C.C., Q.C., LL.D., retired as Vice Chairman of the Commission because of ill health. While the Commission benefited greatly from Mr. Gale's knowledge and experience and acknowledges its indebtedness to him, we wish to state that he did not agree with all the recommendations contained in this Report, particularly those relating to costs.

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CHAPTER 15

RESOLUTION OF INDIVIDUAL QUESTIONS

1. INTRODUCTION

At the conclusion of chapter 14 dealing with monetary relief, the Commission observed that, in some class actions, an aggregate assessment of monetary relief may not be feasible.[1] Accordingly, although the common questions may be decided in favour of the class, individual class members may nevertheless be required to come forward to have the amounts to which they are entitled calculated individually in a form of subsequent proceeding. In chapter 14, we noted that the question of the amount of monetary relief to which class members are entitled is but a single example of an individual issue that may arise in a class action. Because we did not consider this issue to be sufficiently different from other individual issues to merit separate treatment, we left the matter of the procedures for individual assessment of monetary relief to be discussed in this chapter, which will deal with proceedings for the resolution of all kinds of individual issue. These other issues might include such matters as *volenti non fit injuria*, contributory negligence, mitigation, reliance, and the remoteness of damages.

Earlier in this Report,[2] we observed that Ontario courts have long been troubled by class actions involving individual issues that would require proceedings to be held after the common questions have been decided in favour of the class. Although the Ontario Court of Appeal, in *Naken v. General Motors of Canada Ltd.*,[3] permitted a class action to proceed notwithstanding the fact that further proceedings probably would be necessary in order to resolve the issue of reliance for each class member, recent cases reveal a continuing reluctance on the part of the courts to allow class actions where subsequent proceedings to determine individual issues are necessary.[4] Courts that have refused to permit such actions to proceed in class form

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[1] See *supra*, ch. 14, sec. 4.

[2] See *supra*, ch. 2, sec. 2(c)(ii).

[3] (1978), 21 O.R. (2d) 780, 92 D.L.R. (3d) 100 (C.A.) (subsequent references are to 21 O.R. (2d)).

[4] See *Stephenson v. Air Canada* (1979), 26 O.R. (2d) 369, 103 D.L.R. (3d) 148 (H.C.J.), aff'd unreported (February 10, 1981, Ont. C.A.), and *Loader v. Rose Park Wellesley Investments Ltd.* (1980), 29 O.R. (2d) 381, 114 D.L.R. (3d) 105 (H.C.J.). These cases, it should be noted, would have involved individual assessments of damages.

would seem to have been influenced, *inter alia*, by the fact that, under Rule 75 of the Supreme Court of Ontario Rules of Practice,[5] a defendant can obtain neither discovery of, nor costs from, class members other than the representative plaintiff.[6] The proposed *Class Actions Act* would address both these issues.[7]

The position of the Ontario courts is understandable in light of the absence in Rule 75 of any guidance as to the nature of proceedings to determine individual issues that might arise in the context of a class action. In *Naken v. General Motors of Canada Ltd.*[8] , Mr. Justice Arnup, speaking for the Court, commented about the lack of guidance as follows:

> Undoubtedly the plaintiffs face many procedural and evidentiary difficulties if this action is allowed to proceed. If we are to have consumer class actions in Ontario it would be highly desirable that there be enacted legislation or rules of practice or both, pursuant to which such actions could be conducted. I am not persuaded that it is impossible to carry such an action to completion even now, although the reference following judgment would certainly require all of the innovation that the Supreme Court of California [in *Vasquez v. Superior Court of San Joaquin Cty.*, 94 Cal. Rptr. 796 (1971)] indicated was needed, even in that jurisdiction, where statutory procedures already existed.

We believe that the virtual prohibition of class actions involving both common and individual questions is unwarranted, as it prevents the maintenance of suits that might otherwise be suitable for class treatment. Under the present Ontario case law, the presence of a single issue individual to class members might defeat a putative class action, however superior this procedure is to other methods of resolving the dispute, to the ultimate detriment of judicial economy and access to justice. In previous chapters, we have made a number of recommendations designed to make possible the maintenance of class actions involving individual issues. For example, in chapter 8, we recommended that a common questions test be adopted in place of the present "same interest" requirement.[9] In addition, in chapter 11, we recommended that the proposed *Class Actions Act* should provide expressly that questions that may require the participation of individual members of the class following resolution of the common questions should be determined in separate proceedings.[10] Finally, in chapter 14, the Commission proposed that

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[5] Supreme Court of Ontario Rules of Practice, R.R.O. 1980, Reg. 540.

[6] See *Farnham v. Fingold*, [1973] 2 O.R. 132, at 136-37, 33 D.L.R. (3d) 156 (C.A.); *Northdown Drywall & Construction Ltd. v. Austin Co. Ltd.* (1975), 8 O.R. (2d) 691, at 693, 59 D.L.R. (3d) 55 (Div. Ct.); and *York Condominium Corp. No. 104 v. Halliwell Terrace Ltd.* (1975), 12 O.R. (2d) 46 (H.C.J.), at 49.

[7] See *infra*, chs. 16 and 17.

[8] *Supra*, note 3, at 793-94.

[9] See *supra*, ch. 8, sec. 3(c)(v).

[10] See *supra*, ch. 11, sec. 2. It should be understood that this provision will not ensure the certification of every class action involving individual issues. The "superiority" test must be satisfied, which will demand judicial consideration of several factors, including whether common questions of fact or law predominate over any questions affecting only individual class members: see *supra*, ch. 9, sec. 3(b).

certification of an action as a class action should not be refused merely because the relief claimed includes a claim for damages that will require individual assessment in subsequent proceedings involving the defendant or arises out of or relates to separate contracts between members of the class and the defendant.[11]

In this chapter, we shall discuss three issues relating to proceedings to determine individual questions under the proposed Ontario *Class Actions Act*. First, we shall discuss the procedures that should be available. Secondly, we shall consider who should be responsible for the conduct of individual proceedings. Thirdly, we shall discuss a separate, but nonetheless related, matter – the role of the class lawyer at the individual questions stage of a class action. Finally, we shall consider the consequence of a failure by a class member to assert his claim timeously.

2. PROCEEDINGS TO RESOLVE INDIVIDUAL QUESTIONS

(a) General

Proceedings to resolve individual issues differ in a fundamental way from procedures for the distribution of an aggregate award, discussed in the previous chapter. The latter are non-adversarial, as they are directed to implementing a fair distribution of an award for which the defendant already has been held liable. By contrast, proceedings to determine individual questions are intended to resolve disputed issues, both monetary and non-monetary, between the individual class members and the defendant. Where individual proceedings are necessary, the liability of the defendant to the class members or the quantum thereof will not yet have been established. Since the purpose of individual proceedings is to determine the liability of the defendant to members of the class, these proceedings, we believe, should be adversarial in character.

The adversarial nature of proceedings to decide individual issues obliges us to strike a balance between competing interests that are different from those that were weighed when we considered the procedures for the distribution of an aggregate award.[12] While the interest of each class member in securing compensation remains constant, against it must be balanced the interest of the defendant in resisting the fact and amount of his liability. From this conflict of interest arise the two fundamental concerns that, in our view, must be recognized in the proposed class action statute. First, the defendant should be afforded a fair opportunity to contest the validity of claims and to present any defences to them. Secondly, consistent with the "access to justice" rationale of class actions, we believe that class members should be able to secure the relief to which they are entitled without expending more money and effort than is necessary.

Unfortunately, very little guidance is available concerning the structure

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[11] See *supra*, ch. 14, sec. 2(c).

[12] See *supra*, ch. 14, sec. 3(c).

of proceedings to determine individual questions. In the United States, there has been little consideration of this issue. While monetary relief has been the subject of comment, the debate has centred on the question whether aggregate assessment of monetary relief should be permitted, virtually ignoring the problem of assessing damages on an individual basis.[13] In the wider context of the debate about the propriety of class actions, critics have relied upon the argument that large class actions seeking damages are inherently unmanageable because numerous trials of this issue would be required.[14] In response, class action advocates have concentrated upon the advantages of aggregate assessment, while disregarding situations where such an assessment, as a practical matter, is not feasible.[15]

Moreover, few reported cases in the United States have given any indication of the manner in which individual questions are resolved. Nevertheless, those that have done so reveal that the courts have exhibited considerable flexibility. While the nature of the proceedings ordered appears to depend upon the particular substantive law basis of the action, the courts have evinced concern that the proceedings should be designed to encourage class members to assert their claims, while ensuring that the defendant is given a fair opportunity to oppose them.[16]

Similarly, little attention has been given to the design and conduct of individual proceedings in the proposed and enacted class action rules and statutes that we have reviewed. Most rules and statutes simply authorize proceedings for the resolution of individual issues, without indicating when they are appropriate and how they are to be conducted. For example, each of Rule 23 of the Federal Rules of Civil Procedure,[17] Texas Rule 42,[18] and the Illinois Civil Practice Act[19] provides simply that "an action may be brought or maintained as a class action with respect to particular issues". The proposals of the Office for Improvements in the Administration of Justice of the United States Department of Justice[20] also envisaged the possibility of

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[13] Some articles that give limited attention to individual proof of damages include Note, "Proof of Damages" (1974), 68 Nw. U. L. Rev. 1049; Shapiro and Springer, "Management of Consumer Class Actions after *Eisen*: Notice and Determination of Damages" (1975), 26 Mercer L. Rev. 851; Landers, "Of Legalized Blackmail and Legalized Theft: Consumer Class Actions and the Substance – Procedure Dilemma" (1974), 47 So. Calif. L. Rev. 842; and Ball, "Damages in Class Actions: Determination and Allocation" (1969), 10 B.C. Ind. & Com. L. Rev. 615.

[14] See *supra*, ch. 4, sec. 3(b)(iii).

[15] See *supra*, ch. 14, secs. 3(a) and 3(b)(i).

[16] Examples of cases in the employment discrimination context include the following: *Mitchell v. Mid-Continent Spring Company of Kentucky*, 583 F.2d 275 (6th Cir. 1978), and *Kyriazi v. Western Electric Company*, 25 E.P.D. ¶31,796 (3d Cir. 1981).

[17] Fed. R. Civ. P. 23(c)(4). Rule 23 was promulgated at 383 U.S. 1029 (1966).

[18] Tex. R. Civ. P. 42(d)(1).

[19] Illinois Civil Practice Act, Ill. Ann. Stat. ch. 110, §57.3(b) (Smith-Hurd 1981 Supp.).

[20] A Bill To provide for the reform of class action litigation procedures, United States Department of Justice, Office for Improvements in the Administration of Justice, Bill S. 3475, 95th Cong., 2d Sess. (1978) (hereinafter referred to as "O.I.A.J. Bill S. 3475"), and Small Business Judicial Access Act of 1979, United States Department of Justice, Office for Improvements in the Administration of Justice, Bill H.R. 5103, 96th Cong., 1st Sess. (1979) (hereinafter referred to as "O.I.A.J. Bill H.R. 5103").

ordering separate proceedings to decide individual damage issues after the common issues had been decided in favour of the class,[21] but contained no details concerning the procedures to be employed.

The class action mechanisms drafted or influenced by Professor Williams[22] expressly authorize proceedings to determine individual claims following an adjudication in favour of the class on the common questions, but afford little guidance as to their conduct. They stipulate only that the class members and the defendant, like parties to an ordinary civil action, will be subject to liability for costs and have rights of discovery against each other, and that the defendant will have the right to make payment into court.[23] Of these proposals, provisions of the legislation introduced to amend the *Combines Investigation Act*,[24] Bill C-42 and Bill C-13, go further and provide that regulations may "[prescribe] procedures to be followed in settling questions of law or fact that relate to individual members of a class".[25] The class action provisions of the Quebec *Code of Civil Procedure* provide for the conduct of individual proceedings, either by the court that decided the common issues or by a prothonotary, in accordance with terms and conditions set by the court. The court has a discretion in the design of these proceedings, and may, "if it deems it necessary in the interest of justice and of the parties, determine special modes of proof and procedure".[26]

The apparent reluctance of the drafters of these class action mechanisms to attempt to delineate detailed procedures for the resolution of individual issues is not difficult to understand. Class actions may so vary in the kinds of individual question that must be decided, and the number of determinations that may be necessary, that it would be unwise to establish a general code to be followed in every case. While certainty would be the result of such an approach, it might be achieved at the expense of imposing procedures that would be inappropriate in certain cases. If, for example, full-scale trial proceedings were required, in the belief that fairness to the defendant demanded the full panoply of procedures available in civil actions, this might be inordinately expensive and laborious from the perspective of individual class members where the amounts in issue are modest. Alternatively, if the

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[21] O.I.A.J. Bill S. 3475, *supra*, note 20, §3014(b), and O.I.A.J. Bill H.R. 5103, *supra*, note 20, §3026(b).

[22] *An Act to Amend the Combines Investigation Act*, Bill C-42, 1977 (30th Parl. 2d Sess.) (hereinafter referred to as "Bill C-42"); *An Act to Amend the Combines Investigation Act*, Bill C-13, 1977 (30th Parl. 3d Sess.) (hereinafter referred to as "Bill C-13"); Law Reform Committee of South Australia, "Draft Bill for a Class Actions Act", in *Thirty-sixth Report Relating to Class Actions* (1977) (hereinafter referred to as "South Australia Draft Bill"); and Williams, "Model Consumer Class Actions Act", in "Consumer Class Actions in Canada – Some Proposals for Reform" (1975), 13 Osgoode Hall L.J. 1, at 65 (hereinafter referred to as "Williams' Model Act").

[23] Bill C-42, *supra*, note 22, s. 39.21(*a*) and (*b*); Bill C-13, *supra*, note 22, s. 39.19(*a*) and (*b*); South Australia Draft Bill, *supra*, note 22, s. 9(5); and Williams' Model Act, *supra*, note 22, s. 9(5).

[24] R.S.C. 1970, c. C-23, as amended.

[25] Bill C-42, *supra*, note 22, s. 39.22(1)(*d*), and Bill C-13, *supra*, note 22, s. 39.2(1)(*d*).

[26] *Code of Civil Procedure*, R.S.Q. 1977, c. C-25, art. 1039, as enacted by S.Q. 1978, c. 8, s. 3.

rule were informal proceedings with, for example, relaxed rules of evidence and no opportunity for discovery, this might be unfair to the participants in cases involving substantial monetary claims or where complex factual and legal issues are in dispute.

We have contrasted these very different circumstances to illustrate our belief that the range of factors does not permit the design of a detailed code to regulate individual proceedings. Flexibility must be assured so that procedures can be tailored to the situation of the particular class action. However, although we are of the view that the court should be given considerable discretion to order appropriate procedures, we believe that this discretion should be subject to a general standard that recognizes the need to accommodate a compensatory purpose with procedural fairness. We deal with this standard in the following section of the chapter.

Having discussed the policy considerations relevant to the design and conduct of individual proceedings, and the need for flexibility, we turn now to examine the types of procedure that should be available in such proceedings and the persons who should conduct them.

(b) Types of Procedure to be Employed

As we have stated, individual proceedings will be adversarial in nature: a class member who wants compensation will have to take action to establish his right to obtain relief from the defendant, who will be entitled to contest the claim. In purpose, then, these proceedings are similar to an ordinary civil trial.

A civil suit is governed by various evidentiary and procedural rules that are designed to ensure that the adjudication of the dispute is conducted fairly, allowing each party to present his case and to meet opposing arguments. While the Commission recognizes that the adversarial character of individual proceedings makes fairness to the participants a fundamental concern, we do not believe that this necessarily demands the institution of the full panoply of procedures associated with a civil action brought in a county or district court or in the Supreme Court of Ontario. "Fairness", in our view, is not an immutable concept having a fixed content; rather, it is an organic notion that can, and should, adapt to good sense and practical exigency.

We are supported in this view by the fact that existing Ontario legislation has established relatively informal and expeditious procedures for the adjudication of claims, particularly those of modest amounts. The existence of such legislation indicates that the various aspects of an ordinary Supreme Court civil action – pleadings, discovery, and the normal rules of evidence – do not constitute the only acceptable embodiment of what is fair to parties in litigation.

In this respect, reference should be made to the *Small Claims Courts Act*,[27] the *Provincial Court (Civil Division) Project Act*,[28] and the Supreme

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[27] *Small Claims Courts Act*, R.S.O. 1980, c. 476.

[28] *Provincial Court (Civil Division) Project Act*, R.S.O. 1980, c. 397.

Court of Ontario Rules of Practice governing the conduct of references.[29] Since the *Small Claims Courts Act* and the *Provincial Court (Civil Division) Project Act* constitute useful models for the design of proceedings to determine individual questions, we shall turn first to outline the aspects of this legislation that are particularly noteworthy.

The purpose of both the *Small Claims Courts Act* and the *Provincial Court (Civil Division) Project Act* is to allow disputes involving relatively modest amounts to be resolved in a simple, informal, and expeditious manner.[30] The *Small Claims Courts Act* establishes a system of small claims courts throughout the Province to entertain claims within its monetary jurisdiction of $1,000. The *Provincial Court (Civil Division) Project Act* replaces the small claims courts in The Municipality of Metropolitan Toronto with a new court, the Provincial Court (Civil Division) of The Municipality of Metropolitan Toronto, which has a monetary jurisdiction of $3,000.

The conduct of actions in small claims courts is governed by the provisions of the *Small Claims Courts Act* and rules of procedure made pursuant to that Act.[31] Suits brought in the Provincial Court (Civil Division) of The Municipality of Metropolitan Toronto are governed by the *Small Claims Courts Act* and its rules, except insofar as they have been altered by the *Provincial Court (Civil Division) Project Act* and the rules made thereunder.[32] The procedural codes established under these statutes reflect a policy decision that, in the adjudication of relatively small claims, it is permissible to depart from the rigorous standards applicable to civil actions brought in the county or district courts and in the Supreme Court. Among the particular areas in which significant changes have been effected are pleadings, discovery, and the admissibility of evidence.[33] These examples, described briefly below, are illustrative of the kinds of matter that might be modified by a court

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[29] *Supra*, note 5, rr. 402-62.

[30] See, for example, *Turgeon v. Border Supply (EMO) Ltd.* (1977), 16 O.R. (2d) 43 (Div. Ct.), at 45, where Griffiths J., dissenting in the result, stated:

> The basic concept of the Small Claims Court is to provide a forum where people may appear without lawyers to have claims resolved speedily and with a minimum emphasis on technicalities.

Section 2 of the *Provincial Court (Civil Division) Project Act* expressly states the purpose of the Act:

> 2. The purpose of this Act is to enable the establishment and conduct of a project using a limited class of civil actions in The Municipality of Metropolitan Toronto for the development of simplified procedures and of methods of making civil remedies more accessible and reducing delays.

[31] R.R.O. 1980, Reg. 917.

[32] *Provincial Court (Civil Division) Project Act, supra*, note 28, s. 6(2). The Rules of the Provincial Court (Civil Division) are found in R.R.O. 1980, Reg. 806.

[33] Former s. 190(1) of *The Small Claims Courts Act*, R.S.O. 1970, c. 439, making the practice in the Supreme Court applicable to situations not provided for by the Act or rules, was repealed by S.O. 1977, c. 52, s. 18. The repeal of this section removed an express instruction to rely on more formal procedures in circumstances that were not addressed by the Act and the rules.

in designing proceedings to decide individual issues arising out of a class action.

Actions in small claims courts and in the Provincial Court (Civil Division) are instituted by the filing of a simple claim. Section 72(2) of the *Small Claims Courts Act* provides that "[t]he claim shall set out the particulars thereof with reasonable certainty and detail". It has been held that, in fulfilling this directive, parties need not follow the strict rules governing pleadings.[34] Moreover, liberal provision has been made for amendment.[35]

The Rules of the Provincial Court (Civil Division), in addition to requiring minimal formality in pleading, include specially designed forms to be employed by the parties in the course of an action. In an effort to facilitate access to the judicial system, these forms, written in clear and simple language, contain explicit instructions for their use.[36]

Although we shall discuss the topic of discovery in greater detail in the next chapter, at this juncture we do wish to mention the approach to this issue that has been taken in these statutes. In suits brought under the *Small Claims Courts Act*, the only form of discovery that may be permitted by a judge is inspection of documents.[37] In the Provincial Court (Civil Division), discovery is not allowed where the amount claimed is $1,000 or less. Where the claim exceeds $1,000, the judge, on the application of a party, has a discretion to determine whether discovery should be allowed and the form that it should take.[38] For example, discovery by means of written questions and answers may be ordered, instead of the more familiar oral examination for discovery. In subjecting discovery to these controls, the rules made under the authority

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[34] In *Rowley v. Dancsak*, [1954] O.W.N. 720 (Div'n Ct.), at 721, the Court stated:

> Since a large number of litigants in the Division Court appear before the Court in person and prepare their own so-called pleadings, which consist for the most part of an invoice or a letter to the Division Court Clerk or some other informal document, it is in my opinion impracticable to insist on strict observance of the rules relating to pleadings.

[35] *Small Claims Courts Act, supra*, note 27, s. 19, and Rules of the Provincial Court (Civil Division), *supra*, note 32, rr. 3, 4, and 59.

[36] See the paper by Clemenhagen presented to the Small Claims Seminar, Department of Continuing Education, Law Society of Upper Canada, November 29, 1980, at 1-2:

> In order to open the access of the Court to the non-professional litigant, forms are provided which cover most of the circumstances which may come to light during the course of the law suit. Rule 5 provides that the forms shall be used. As a result, the form of pleadings used in the more senior courts appear to have been supplemented by the use of forms which are intended to simplify the procedure for the laymen. It is doubtful at the present time whether a form of pleading drafted in the form as required for the Supreme and County Courts would be accepted by the Small Claims Court unless it is annexed to the applicable form as provided.

[37] *Supra*, note 31, r. 33. From 1962 to 1977, in an action brought in a small claims court in a provisional judicial district, a judge had a discretion to make an order respecting production and discovery where claims were in excess of $400: see *The Small Claims Courts Act*, R.S.O. 1970, c. 439, s. 196(2), repealed by S.O. 1977, c. 52, s. 21.

[38] Rules of the Provincial Court (Civil Division), *supra*, note 32, r. 42(2).

of the *Small Claims Courts Act* and the *Provincial Court (Civil Division) Project Act* effect a substantial departure from the manner in which an ordinary action is conducted in the county or district courts or in the Supreme Court. Evidently, it was thought that, because the proceedings were intended to be inexpensive and expeditious, the denial or curtailment of discovery was justifiable and, more significantly, was not inherently unfair to parties.[39]

Under both the *Small Claims Courts Act* and the *Provincial Court (Civil Division) Project Act*, the usual rules of evidence applicable to civil actions have been modified substantially. Evidence otherwise inadmissible in the Supreme Court of Ontario, including hearsay evidence, may be admitted by a judge, subject to a threshhold prerequisite of relevance.[40] Moreover, the court, if satisfied as to its authenticity, may admit or use in evidence a copy of any "document or other thing".[41] In addition, subject to certain qualifications, under the Rules of the Provincial Court (Civil Division),[42] written evidence, including documents, such as reports of experts, hospital records, repair bills and estimates, may be received in evidence, unless the opposing party demands that the witness or author of the document be present and available for cross-examination.[43] An example of the breadth of the discretion to receive evidence is the case of *Rajakaruna v. Air France*,[44] where evidence in the form of a letter from abroad was admitted.

Notwithstanding these inroads on the law of evidence, there are

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[39] In *Rajakaruna v. Air France* (1979), 25 O.R. (2d) 156, at 159, 11 C.P.C. 172 (H.C.J.), Mr. Justice Grange stated that "[discovery] is not available in the Small Claims Court because of the desire to avoid formality and delay and its absence is justified because of the limitation of the amounts that can be claimed".

[40] *Small Claims Courts Act, supra*, note 27, s. 98, and Rules of the Provincial Court (Civil Division), *supra*, note 32, r. 51.

In *Johanson v. Williamson* (1977), 18 O.R. (2d) 585 (Sm. Cl. Ct.), at 587-88, the Court said:

> In line with the general philosophy of the *Small Claims Courts Act* as expressed in s. 55 [now s. 57], the rules as to the admission of evidence are substantially enlarged by new s. 96a [now s. 98] so as to permit easier proof by means not acceptable in higher Courts. This provision appears to be designed to relieve against strictness of proof with its attendant proliferation of witnesses, expense and technicality thereby permitting easier use of the Courts by ordinary citizens unencumbered by the exotic technicalities of the laws of evidence and the need for legal erudition.

[41] *Small Claims Courts Act, supra*, note 27, s. 98(4).

[42] *Supra*, note 32.

[43] *Ibid.*, r. 53. While we support the intent of r. 53, that is, to allow parties to establish facts through documentary evidence, we have some reservations about its efficacy in class litigation. Rule 53(2) allows the opposing party to require the attendance of the author of a document or a witness as of right. Since there appears to be no sanction against an opposing party requiring such attendance when he does so for improper reasons, it would seem that the opposing party always would be inclined to invoke r. 53(2). From this perspective, we prefer the general flexibility of s. 98 of the *Small Claims Courts Act.*

[44] *Supra*, note 39. See, also, *Howard v. Canadian National Express*, unreported (February 27, 1980, Sm. Cl. Ct., Dist. of Algoma, Ont.), where the Court allowed the introduction of two letters that constituted hearsay.

restrictions upon what can be received by a court. Matters inadmissible by reason of any privilege under the law of evidence, or inadmissible under any statute, are inadmissible in a small claims court and in the Provincial Court (Civil Division).[45] Statutory provisions that limit the extent to which, or the purposes for which, oral testimony, documents, or things may be admitted or used in evidence in proceedings nonetheless prevail.[46]

The current practice respecting references furnishes additional support for a flexible, pragmatic approach to the design of individual proceedings. Under the *Judicature Act*,[47] a reference may be ordered by a judge of the High Court. While numerous rules apply to references,[48] it is evident that a broad power to structure the proceedings has been conferred by Rule 425, which states as follows:

> 425. In giving directions and in regulating the manner of proceeding before him, the Master shall devise and adopt the simplest, most speedy and least expensive method of prosecuting the reference, and with that view may dispense with any proceeding ordinarily taken which he conceives to be unnecessary or substitute a different course of proceeding for that ordinarily taken.

That proceedings on a reference need not attain the standards of formality required for civil trials further supports our contention that fairness is a fluid concept that can be shaped to accommodate necessity.

The Commission has concluded that the proposed *Class Actions Act* should authorize the types of procedure in the legislation discussed above. We therefore recommend that the proposed Act should confer upon the judge who determines the common questions a broad discretion to fashion proceedings for the resolution of individual issues. In particular, we believe that a court should be authorized to dispense with any procedure that it considers unnecessary, and to direct special procedures where necessary. However, the procedures adopted in a particular case should take into account the interests of class members in achieving compensation and that of the defendant in disputing liability. Accordingly, we further recommend that, in fashioning individual proceedings, a court should be required to order the simplest, least expensive, and most expeditious method of determining the issues that is consistent with justice to the members of the class, the defendant, and the representative plaintiff, including dispensing with any procedure that it considers unnecessary and directing special procedures regarding such matters as discovery, admission of evidence, and means of proof.[49]

Perhaps the most important considerations to be weighed by a court in

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[45] *Small Claims Courts Act*, *supra*, note 27, s. 98(2), and Rules of the Provincial Court (Civil Division), *supra*, note 32, r. 51.

[46] *Small Claims Courts Act*, *supra*, note 27, s. 98(3).

[47] R.S.O. 1980, c. 223, ss. 70 and 71. See, also, the *County Courts Act*, R.S.O. 1980, c. 100, ss. 28 and 29.

[48] *Supra*, note 5, rr. 402-62.

[49] See Draft Bill, s. 31(7). With respect to discovery at the individual questions stage of a class action, see *infra*, ch. 16, sec. 5(c).

determining the form of individual proceedings are the size of the claims in issue and the nature of the questions to be decided. Where claims are substantial, and complex issues of fact and law are in dispute, we envisage that a court would order proceedings that would resemble closely an action brought in a county or district court or in the Supreme Court of Ontario. The difficulty of the issues and the significant financial stake of the individual class members and the defendant, in our view, normally will demand that the parties receive the benefit of pleadings, full rights of discovery, and the presentation of *viva voce* testimony in a hearing governed by the normal rules of evidence. Proceedings of this nature would be warranted, for example, if class members were claiming compensation for serious personal injuries.

It would be possible under our recommendation, however, to order less formal adversarial proceedings where these are appropriate. While a court might dispense with certain procedural aspects of an ordinary civil action, we anticipate that, in many cases, a form of oral hearing might well be the norm. In deciding the proper configuration of procedures to order, the court, pursuant to our proposal, will be obliged to reconcile the desirability of a simple, expeditious proceeding with the imperative of ensuring fairness to the class members, the representative plaintiff, and the defendant.

While we would expect that, in many cases, a form of adversarial hearing would be ordered where proceedings to determine individual issues are necessary, we anticipate that the particular circumstances of a case may permit a court to order a procedure for the summary resolution of the issues. Where, for example, the remaining issue concerns only the amount of monetary relief to which individual class members are entitled, this issue may be susceptible of proof by documentary evidence, such as bills, receipts, or cancelled cheques, without the need to give the defendant an opportunity to contest the claims at a formal hearing. Again, our recommendation is intended to be sufficiently flexible to permit a court to adopt procedures for the summary resolution of individual issues where this is consistent with fairness to the class members and the parties.[50]

(c) Individuals Conducting Proceedings

In the previous section, we identified two factors that would influence a

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[50] In such a case, the parties and the court may find that the procedures for summary judgment provided for in the Supreme Court of Ontario Rules of Practice furnish a procedural analogue. However, under the present rules of procedure, the availability of summary judgment under r. 33 is considerably circumscribed; for example, only the plaintiff can obtain a summary judgment, and it is available only in respect of certain kinds of action. Compare r. 22 of the Proposed Rules of Civil Procedure recommended by the Civil Procedure Revision Committee, *infra*, note 57, which would essentially make summary judgment available whenever any party, including a defendant, can demonstrate that there is no defence or merit to the action, as the case may be, and that he is entitled in law to judgment. Such a judgment would be available on the basis of affidavit evidence. Rules resembling proposed r. 22 (although not necessarily available to both plaintiffs and defendants) already exist in several jurisdictions. See, for example, English Rules of the Supreme Court 1965, Ord. 14; Alberta Rules of Court, Alta. Reg. 390/68 as am., r. 159; British Columbia Supreme Court Rules, B.C. Reg. 310/76 as am., r. 18; and Nova Scotia Civil Procedure Rules and Related Rules, r. 13. See, also, United States Fed. R. Civ. P. 56.

court in deciding what procedures should be employed to determine individual issues: the complexity of the issues and the size of the claims of the class members. The operation of these factors also might influence any decision concerning who should be given responsibility for the conduct of the proceedings. A third factor that might be of critical importance in deciding this matter is the number of adjudications that are necessary.

In light of the broad range of circumstances in which a court may be required to order individual proceedings, we believe that the judicial discretion to design individual proceedings should be sufficiently broad and flexible to allow the judge who decides the common questions to choose to conduct them himself or, where necessary, to secure the assistance of one or more other persons, including masters or other judges.

For example, where the number of class members permits, it may be desirable to have the common questions judge preside over proceedings involving substantial claims or complex issues of fact and law.[51] Since, as we have explained, these factors would favour the institution of proceedings that would resemble full-scale civil trials, it is our opinion that they should be heard by a judge. An additional factor that, we believe, would favour the participation of the judge who has decided the common questions is the existence of a close relationship between the common questions that have been decided and the individual questions that remain to be determined. If the individual issues are not completely discrete, but are connected in some way to the common issues, it would make sense to have the same person deal with both; otherwise, the person who is asked to adjudicate upon the individual questions will have to acquire the requisite background information and understanding already possessed by the judge who decided the common questions.

In some cases, however, where the size of the class and the complexity of the issues require the institution of relatively formal individual proceedings, the resolution of individual issues simply could not be undertaken by a single person. Where the amounts at stake and the difficulty of the issues are sufficiently great that the judge who has decided the common questions is of the view that formal, trial-like individual proceedings are warranted, but there are too many class members for the individual questions to be resolved by a single judge, it would seem appropriate for the judge who decided the common questions to have the power to order that some of the claims be adjudicated by other judges.[52]

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[51] An example of such a case would be a mass tort action, where there would likely be large claims for personal injury or wrongful death, and because difficult questions, such as contributory negligence, *volenti non fit injuria*, remoteness, and foreseeability might remain to be decided. Often these issues would be inextricably connected to the common questions.

[52] Unfortunately, there is almost no guidance on this matter available in the United States. We are aware of a single case, *State of Alabama v. Blue Bird Body Co.*, 573 F.2d 309 (5th Cir. 1978), that discusses whether the adjudication of individual issues should be handled by several judges. The case concerned a class of persons from all over the United States. The trial judge had proposed to send the claims to various district courts, which would be able to dispose of them in a manner thought appropriate, without any guidance from the trial judge. The Court of Appeals for the Fifth Circuit, although not deciding the issue, doubted the propriety of this action.

Accordingly, we recommend that, where the common questions are determined in favour of the class, and subsequent proceedings that require participation by members of the class and the defendant are necessary to determine individual questions, the judge who has decided the common questions should be able to conduct such proceedings alone or with other judges of the court.[53] In view of the innovative nature of this proposal, the judge who has decided the common questions should consult with the Chief Judge of the County and District Courts or the Chief Justice of the High Court, as the case may be, in order to ensure that the caseload can be equitably and efficiently allocated.

As indicated in the previous section, not all class actions involving individual issues will require full-scale, trial-like proceedings. In some cases, where numerous claims must be adjudicated, but circumstances allow the court to order more simple proceedings, the judge who has decided the common questions should be empowered to direct that one or more persons, other than a judge, conduct the proceedings by way of inquiry and report.[54]

It will be noted that this power is similar to, but broader than, the reference power under the *Judicature Act*.[55] Section 70(1) of that Act permits a judge of the High Court to refer "a question arising in an action for inquiry and report either to an official referee or to a special referee agreed upon by the parties". Section 71 of the *Judicature Act* permits a High Court judge to refer "the whole action or any question or issue of fact arising therein or question of account" to a referee in three situations: first, where the parties consent; secondly, where "prolonged examination of documents or a scientific or local investigation is required that cannot . . . conveniently be made before a jury or conducted by the court directly"; and thirdly, "where the question in dispute consists wholly or partly of matters of account". A county court judge has the same power to order a reference as a judge of the High Court.[56]

There are a number of reasons why the Commission is not content simply to rely upon the reference power contained in the *Judicature Act*. First, while section 70(1) would appear broad enough to permit the judge who has decided the common questions to refer individual questions arising in a class action to the persons specified therein, the ambit of the reference power would be narrowed by the proposals of the Civil Procedure Revision Committee, if adopted.[57] Secondly, and more importantly, we are of the view

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[53] See Draft Bill, s. 31(1)(*a*).

[54] This procedure clearly was envisaged by Arnup J.A. in *Naken v. General Motors of Canada Ltd., supra*, note 3, at 796, as a means of disposing of the individual reliance issues in that case.

[55] *Supra*, note 47.

[56] See *County Courts Act*, R.S.O. 1980, c. 100, ss. 28 and 29.

[57] See Province of Ontario, Ministry of the Attorney General, Civil Procedure Revision Committee, untitled report (June 1980), Proposed Rules of Civil Procedure, r. 56. This rule would have the effect of collapsing the distinction between references under ss. 70 and 71 of the *Judicature Act, supra*, note 47. More specifically, a reference no longer could be ordered in respect of any "question arising in an action", as is now the case under s. 70(1) of the *Judicature Act*.

that the court should have the power to refer individual questions to a broader range of persons than is possible under section 70(1).[58] For example, while we anticipate that masters will often be employed to deal with individual questions, we think it should be possible also to appoint retired judges, or other persons, to conduct individual proceedings. Finally, we are of the view that not all the Supreme Court of Ontario Rules of Practice applicable to references are particularly relevant in the class actions context.[59] In our view, it is the judge who has decided the common questions who should specify the procedures to be employed in individual proceedings.[60]

We have concluded that, subject to one qualification, dealt with in the next section,[61] there is no reason to constrain the "reference" power of the common questions judge in a class action in the manner in which references are limited under the *Judicature Act*. Accordingly, we recommend that the proposed Ontario *Class Actions Act* should expressly empower the court to appoint one or more persons to conduct individual proceedings by way of inquiry and report and, in conferring this discretion, should use general language that will allow the court to refer any kind of issue.[62]

At first glance, the prospect of a number of individuals, whether judges or other persons, resolving individual questions would appear to create the risk of inconsistent decisions. However, in the case of claims that, in the absence of a class action, would be litigated in separate actions, there would be an even greater risk of inconsistency, not only in relation to the individual questions, but also with respect to the questions common to the class members. In order to minimize this problem, and as part of the general supervisory role that we envisage for the judge who has decided the common questions at the individual issues stage of a class action, we recommend that that judge should be empowered to give such directions as are necessary for the conduct of individual proceedings by other judges or any other persons, including any directions necessary to achieve conformity of proceedings.[63]

Finally, we believe that the proposed *Class Actions Act* should make it clear that the parties should be permitted to settle the form of the individual proceedings upon consent; however, this right should be subject to the approval and supervision of the court, in order to ensure that the rights of the

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[58] Section 95(1) of the *Judicature Act, supra*, note 47, provides that only "[j]udges of county courts, masters, registrars, local masters, local registrars, and deputy registrars are official referees for the trial of such questions as are directed to be tried by an official referee".

[59] For example, r. 406 of the Supreme Court of Ontario Rules of Practice, *supra*, note 5, requires notice to be given "to every party affected" by a reference, unless otherwise ordered by the master. This is a determination that, we believe, should be made by the judge who has decided the common questions.

[60] See the discussion of the supervisory role of the judge who decides the common questions, *supra*, ch. 11, sec. 4(b)(ii), and see our recommendation *infra*, this sec.

[61] That is, the need for confirmation of a referee's report by the judge who has decided the common questions.

[62] See Draft Bill, s. 31(1)(*b*).

[63] *Ibid.*, s. 31(2).

class members are protected. For example, the representative plaintiff and the defendant may wish to have the individual issues determined by an arbitrator. To make it clear that the representative plaintiff is able to consent on behalf of the class members to the form of individual proceedings, the Act should explicitly so provide. We therefore recommend that the judge who has decided the common questions should be able, on consent of the defendant, and of the representative plaintiff on behalf of the class, to provide for such individual proceedings as agreed to by the parties and for the conduct thereof.[64]

(d) Confirmation of Proceedings

The Commission is of the view that, where an individual has been appointed to conduct individual proceedings by way of inquiry and report, the ultimate decision concerning whether any particular claim is successful should remain with the judge who has decided the common questions. As part of his duty to supervise the progress of the class suit, that judge should have the final responsibility to determine the individual questions.

Moreover, we are concerned that, in the absence of such scrutiny, constitutional problems could arise. Section 96 of *The British North America Act, 1867*[65] confers upon the Governor General in Council the authority to appoint judges of the superior, county, and district courts. As a corollary to this section, a province is precluded from transferring the jurisdiction of those courts to judges or officers whom it appoints.[66] Accordingly, it is important that section 96 not be contravened by any arrangement under which the judge who has decided the common questions orders a master or some other person who is not a section 96 judge to conduct proceedings to resolve individual questions; there might well be a risk of contravening section 96 if, in so ordering, the judge who has decided the common questions were, in effect, to relinquish his own jurisdiction to render a final decision. Whether the issues to be determined concern the amount of monetary relief to which individual members may be entitled or questions relating to the liability of the defendant to particular class members, they would almost certainly be issues whose adjudication has traditionally come within the jurisdiction of the courts named by section 96.[67]

In *Attorney-General for Ontario and Display Service Co. Ltd. v. Victoria Medical Building Ltd.*,[68] the Supreme Court of Canada held unconstitutional

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[64] *Ibid.*, s. 31(1)(*c*).

[65] 30 & 31 Vict., c. 3 (U.K.).

[66] See, for example, *Re Residential Tenancies Act of Ontario* (1981), 37 N.R. 158 (S.C.C.), aff'g (1980), 26 O.R. (2d) 609, 105 D.L.R. (3d) 193 (C.A.). Compare *Tomko v. Labour Relations Board (Nova Scotia)*, [1977] 1 S.C.R. 112, 69 D.L.R. (3d) 250.

[67] See, for example, *Lucy v. Interbuild Development Ltd.* (1975), 48 D.L.R. (3d) 150, [1975] 1 W.W.R. 244 (Alta. S.C., T.D.).

[68] [1960] S.C.R. 32, 21 D.L.R. (2d) 97. For a recent discussion of the jurisdiction of the master, see *Re S.B.I. Management Ltd. and 109014 Holdings Ltd.* (1981), 128 D.L.R. (3d) 89, [1981] 5 W.W.R. 714 (Alta. C.A.).

a provision of the Ontario *Mechanics' Lien Act*[69] that gave the master jurisdiction to try mechanics' lien actions and to render final judgment. The Court took the position that the master could not be given the power of final adjudication as a substitute for a section 96 judge. Under the statutory provision under consideration, the jurisdiction of the master was not analogous to the confined and controlled jurisdiction ordinarily exercised in a reference under the *Judicature Act*,[70] where his findings are embodied, not in a judgment, but in a report that is subject to confirmation by a section 96 court.[71]

In a later case, *Zacks v. Zacks*,[72] the Supreme Court elaborated its understanding of the acceptable relationship between a provincially appointed master and a section 96 judge. The Court stated that there will be no violation of section 96 provided that the jurisdiction that is conferred upon a provincially appointed officer is limited to the power to inquire and report, as distinguished from the power to adjudicate. However, it appears that the supervision that the referring judge exercises over the findings of the referee must be genuine. It is unlikely that the strictures of section 96 can be evaded by giving to a referee *de facto* jurisdiction to decide, subject only to *pro forma* confirmation by the referring judge.[73]

In this context, reference should also be made to the recent comments of the Ontario Court of Appeal in *Parry v. Parry*[74] concerning the appropriate role for a family law commissioner, who is also a provincial appointee. Although the case was not concerned with the constitutional issue, the following remarks would appear to have a general application:[75]

> [A] report of a commissioner, to be meaningful, should be complete in its assessment of the witnesses and give the factual bases for the conclusions reached and the recommendations made. This is necessary if the Judge to whom the report is made is to be in a position to exercise his judgment in the matter. He does not consider such a report as if he were a Judge sitting in appeal from it.

To put this matter beyond peradventure and to avoid needless litigation, the Commission believes that the constitutional issue should be given specific attention in the proposed *Class Actions Act*. Accordingly, we have recommended that, where one or more persons other than section 96 judges are appointed to conduct individual proceedings, they should be given a limited power to inquire and report.[76] We now recommend that a person appointed

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[69] R.S.O. 1950, c. 227, s. 31(1). See now R.S.O. 1980, c. 261, s. 35(2)(*a*).

[70] *Supra*, note 47.

[71] *Supra*, note 5, r. 512.

[72] [1973] S.C.R. 891, 35 D.L.R. (3d) 420.

[73] See *Maitre v. Chisvin* (1958), 15 D.L.R. (2d) 120, 25 W.W.R. 664 (Man. C.A.), where the Court set aside the judgment of a county court judge on the ground that, since he had simply adopted the findings and recommendations of the referee, the referee rather than the judge had actually decided the issues between the parties.

[74] (1978), 8 C.P.C. 56 (Ont. C.A.).

[75] *Ibid.*, at 56.

[76] See *supra*, this ch., sec. 2(c).

to conduct individual proceedings by way of inquiry and report should record his findings in a report, which should not be effective until confirmed by the common questions judge.[77]

(e) The Class Lawyer

Throughout this Report, whenever we have discussed the role of the class plaintiff and the class lawyer, we have focused upon their ability to prosecute the questions common to the class members. In proceedings respecting the common issues, whether at certification, prior to trial, or at trial, the class representative and his counsel represent the class as an entity. Regardless of the outcome, these proceedings are binding on the individual class members.[78] In view of the serious ramifications of their actions, this Commission earlier recommended that, as a prerequisite to certification, the court should be satisfied that the representative plaintiff and the class lawyer will fairly and adequately protect the interests of the class.[79]

In this section, we shall discuss briefly the role of the class lawyer at the individual issues stage of a class action. At this juncture, the nature of the class action, in a sense, has altered; the "class" or common elements of the suit have been determined, leaving only individual questions, the resolution of which demands that hitherto passive class members take action. Thus, the representative quality of the class action begins to recede, while the action begins increasingly to resemble, both in purpose and in form, a collection of small civil trials focusing upon a few narrow issues that do not deal with those issues determined in the common proceedings. We believe that, notwithstanding this change in the nature of a class action, the class lawyer still has a representative function to perform. We anticipate that this might take a number of forms.

For example, after the common questions have been decided in favour of the class, the court will have to decide what procedures should be employed to resolve the individual questions. The class lawyer, as guardian of the interests of the class, should make representations to the court concerning the appropriate procedures to be employed. Pursuant to our earlier recommendations, the judge who decides the common questions will have a broad discretion to structure the proceedings, which may range along a continuum of complexity from brief, informal proceedings conducted by a referee to full trials, subject to the rules of evidence.

Often, there will be a conflict between the views of the class members and those of the defendant as to the kind of proceedings that should be ordered. We would expect class members to favour less formal proceedings that would allow them to prove their claims in an inexpensive, expeditious fashion. By contrast, the defendant, in many cases, is likely to urge the court to order more formal proceedings. This procedural question is a matter in which all

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[77] See Draft Bill, s. 31(3).

[78] See *infra*, ch. 18, sec. 4.

[79] For a discussion of the adequacy of representation prerequisite, see *supra*, ch. 8, sec. 4(c).

class members would have a common interest. Class counsel will be intimately familiar with the litigation, including the relationship between the individual questions and the common questions and, accordingly, would be best able to represent the interests of the class. Other areas in which the class lawyer might continue to represent the interests of the class include settlement of the class claims[80] and motions for directions regarding the nature of the individual proceedings.[81]

Another function that, we believe, might be performed by the class lawyer is in the traditional mould. If class members wish to retain counsel to assist them in pursuing their claims in individual proceedings, they should be entitled to choose the class lawyer. Of course, they may decide to select another lawyer.[82] Representation of class members in individual proceedings differs in nature from the representative functions that we have just described. Although the former functions operate in the context of individual proceedings, they involve the furtherance of common interests in securing procedures that will facilitate the maintenance of claims, so that these functions nonetheless constitute representation of the class *qua* class. By contrast, the latter function cannot be characterized as having this "class" quality: it relates to representation of the class *qua* individuals.

Since the class lawyer already may be familiar to class members – as a consequence of his earlier activities on their behalf – he will have a practical advantage over other lawyers when absent class members consider whom they should ask to assist them. This advantage will have beneficial economic consequences for the lawyer, as his remuneration will increase with the number of class members who retain him. However, we cannot see how this inevitable result of allowing the class lawyer to act on behalf of class members will be detrimental to their interests. First, we would expect that post-judgment notice, advising the class of the necessity of taking active steps to secure compensation, would normally indicate that the class members may retain any lawyer of their choice, and need not select the class lawyer. Secondly, if there is any evidence of untoward conduct, such as solicitation, this could be dealt with by The Law Society of Upper Canada. Finally, where a lawyer represents individual class members, a traditional lawyer-client relationship will exist, which will include the normal arrangements respecting costs.[83] As in any other action, a bill rendered by the class lawyer will be subject to taxation under the *Solicitors Act*.[84] This will afford the usual protection against excessive fees that is available in Ontario.

3. FAILURE BY CLASS MEMBERS TO ASSERT THEIR CLAIMS

Before leaving the discussion of procedures for the determination of individual issues, we wish to deal briefly with one final point that concerns

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[80] For a discussion of the topic of settlement, see *infra*, ch. 20.

[81] For example, there may be no need for the defendant to discover all class members. For a discussion of discovery, see *infra*, ch. 16, sec. 5(b).

[82] Indeed, where their claims are substantial, class members might well wish to retain other counsel.

[83] See *infra*, ch. 17, sec. 5(c).

[84] R.S.O. 1980, c. 478.

not only individual proceedings, but any proceedings in which class members are expected to assert claims actively. This may be the case where class members are required to come forward to claim a share of an aggregate award,[85] or where individual proceedings that require the participation of members of the class and the defendant are necessary following the resolution of the common questions.

It is anticipated that, in the interests of the efficient administration of the class action, a reasonable time limit will be imposed by the court within which class members will be expected to take the prescribed action to assert their claims. We are of the view that, if a class member does not take such action within the time specified, he should not be allowed to recover except by leave of the court. In the case of an aggregate award, the fact that some class members have not filed their claims within the prescribed time should not inhibit a court from making orders for the distribution of the residue of the aggregate award. In cases where individual proceedings are necessary, the defendant should not be left in a state of uncertainty respecting the amount of his ultimate liability because of the prospect that some class members might assert a claim in the future. However, where proceedings have not advanced to the point that the other class members or the defendant would be prejudiced thereby, we would expect that a court would be liberal in granting leave.

The Commission, therefore, recommends that the proposed *Class Actions Act* should provide that, where the court makes an order concerning the manner in which a member of the class may claim his share of an aggregate award, or where individual proceedings requiring the participation of class members and the defendant are necessary, a member of the class who fails to take such further action as is necessary to establish his entitlement to the relief claimed within the time prescribed by the court should not be entitled to recover except by leave of the court.[86]

Recommendations

The Commission makes the following recommendations:

1. The proposed *Class Actions Act* should contain a provision conferring upon the judge who decides the common questions a broad discretion to fashion proceedings for the resolution of individual issues; however, this provision should recognize the interests of class members in achieving compensation and of the defendant in disputing liability. Accordingly, the court should be required to order the simplest, least expensive and most expeditious method of determining the issues that is consistent with fairness to the class members, the defendant, and the representative plaintiff. In particular, the court should be authorized to dispense with any procedure it considers unnecessary, and to direct special procedures regarding such matters as discovery, admission of evidence, and means of proof.

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[85] See *supra*, ch. 14, sec. 3(c)(iii).

[86] See Draft Bill, s. 32.

2. The proposed *Class Actions Act* should empower the judge who has decided the common questions to conduct the individual proceedings alone, or with the assistance of other judges of the same court.

3. The proposed *Class Actions Act* should also empower the judge who has decided the common questions to appoint one or more persons, other than a judge, to conduct the individual proceedings by way of inquiry and report.

4. The judge who has decided the common questions should be able to give such directions as are necessary for the conduct of individual proceedings by other judges or other persons, including any directions necessary to achieve conformity of proceedings.

5. The proposed *Class Actions Act* should empower the judge who has decided the common questions, on consent of the defendant, and of the representative plaintiff on behalf of the class, to provide for such individual proceedings as agreed to by the parties, and for the conduct thereof.

6. The proposed *Class Actions Act* should provide that a person appointed to conduct individual proceedings by way of inquiry and report should record his findings in a report, and that the report should not be effective until confirmed by the judge who has decided the common questions.

7. The proposed *Class Actions Act* should provide that, where the court makes an order concerning the manner in which a member of the class may claim his share of an aggregate award, or where individual proceedings requiring the participation of the class members and the defendant are necessary, a member of the class who fails to take such further action as is necessary to establish his entitlement to the relief claimed within the time prescribed by the court should not be entitled to recover except by leave of the court.

CHAPTER 16

DISCOVERY

1. INTRODUCTION

In this chapter, we shall consider the general issues of whether, and in what manner, the Supreme Court of Ontario Rules of Practice[1] governing discovery should apply to class actions. Although, in this Report, we generally have eschewed examining particular procedures in order to assess their compatibility with the recommended class action procedure,[2] we are of the view that the subject of discovery does merit special attention.

There are two reasons why we believe particular attention is warranted. First, it would appear that, under present Ontario law, a defendant cannot obtain discovery of class members, other than the class representative, even where he is unable to obtain the necessary information from the class plaintiff. That a defendant to a civil action may be denied information crucial to his defence is a matter of obvious concern. We shall say more about the present law in due course.

The second factor that has convinced us of the need to examine discovery as a discrete matter is the experience with this procedure in the United States. In grappling with the question of the application of ordinary discovery rules to class actions brought under Rule 23 of the United States Federal Rules of Civil Procedure,[3] the courts have arrived at different solutions, resulting in uncertainty respecting the proper practice to be followed. In response to the unsettled state of the jurisprudence, this problem has been addressed specifically in several class action mechanisms. Mindful that a failure to provide explicit statutory guidance for Ontario courts could give rise to similar uncertainty in this Province, it is our view that the proper policy should be determined at the outset.

Before we proceed, it would be instructive to recount briefly the general purposes of discovery. Discovery can be regarded as having certain "direct" purposes that facilitate the achievement of broader, salutary goals. First, discovery is intended to apprise each party of the factual case that will have to

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[1] Supreme Court of Ontario Rules of Practice, R.R.O. 1980, Reg. 540.

[2] Indeed, we recommended earlier that the Rules of Practice should apply to class actions, except to the extent that they are inconsistent with the proposed *Class Actions Act* and the rules promulgated thereunder: see *supra*, ch. 6, sec. 1(b)(vi).

[3] Fed. R. Civ. P. 23, promulgated at 383 U.S. 1029 (1966).

be met at trial. Secondly, its aim is to allow a party to secure admissions from his opponent that will either weaken the position of his adversary or buttress his own, while obviating the need to prove elements of his own case. These purposes are in service of larger aims. Afforded knowledge of the strengths and weaknesses of their own and their opponent's case, the parties are encouraged to negotiate a settlement of the action prior to trial. Should agreement not be reached, disclosure of the opponent's case prevents one party from relying unfairly on the element of surprise at trial. Finally, discovery serves to define more accurately the matters in dispute between the parties, so that the presentation of evidence will be directed to the real issues, and will not be focused on extraneous matters.[4]

The major issues respecting the application of the discovery rules to class actions arise out of the fact that a class action is a representative action in which the class members ordinarily will not be actively involved. These issues are whether absent class members should be subject to discovery by the defendant, and whether the defendant should be subject to discovery by class members other than the representative plaintiff.

Of these questions, the former – whether class members other than the representative plaintiff should be subject to discovery by the defendant – is of greater importance and, consequently, will be the primary focus of our concern. In answering this question, two important interests must be balanced. The first is the legitimate interest of class members in securing the relief to which they are entitled without being impeded by unnecessary obstacles. Responding to a request for discovery, whether by examination for discovery or by production of documents, inevitably will be burdensome. Class members will have to understand what is demanded of them, which may oblige them to seek legal advice, and they will be required to do whatever is necessary to compile and present the requested information. To the extent that expense will be incurred in complying with requests for discovery, the cost of asserting an individual claim will be increased, possibly transforming individually nonrecoverable claims into nonviable claims. Even if this were not the result, a class member, faced with a discovery request, might be discouraged from further participation in the class action.

Against the interest of class members in obtaining relief at minimal cost and inconvenience must be balanced the interest of the defendant in securing information important for the effective preparation and conduct of his case. Given that he might have been able to avail himself of discovery had he been sued in individual actions by the members of the class,[5] the defendant, if denied necessary information, might be at a strategic disadvantage because the suit has been brought in class form. Where a defendant cannot prepare his case without discovery of one or more absent class members, we believe that he has a legitimate interest in such discovery that should be weighed against that of the class members.

The weight to be given to these interests will vary, however, with the stage

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[4] See Choate, *Discovery in Canada* (1977), at 4-5, and Williston and Rolls, *The Law of Civil Procedure* (1970), Vol. 2, at 743-45.

[5] A defendant's rights of discovery depends upon the court in which the action against him is brought: see *infra*, this ch., secs. 2 and 5(c).

of the class action proceedings at which discovery is sought; different considerations will apply at the pre-certification and the common questions stages of a class action than at the individual issues stage. The recommendations that we make in this chapter reflect our view of the balance that should be struck at these various stages. Before turning to a discussion of the approach that we propose, a review of the present law of discovery in the class action context in Ontario, of discovery under Rule 23, and of the solutions to the issue suggested in other class action mechanisms would seem to be in order.

2. PRESENT LAW IN ONTARIO

Under Rule 326(1) of the Ontario Rules of Practice, a party has the right to examine orally a party to whom he is adverse in interest, subject to an overriding relevancy requirement that the examination "[touch] the matters in question".[6] Rule 340 provides that, on an oral examination, if required by subpoena or notice, a party must produce all books, papers, and documents that he could be required to produce at trial.

Generally, a person who is not a party to the action is not subject to examination for discovery. Rule 333(1), however, stipulates that, "[w]here an action is prosecuted or defended for the immediate benefit of a person . . . such person . . . may without order be examined for discovery".[7] This Rule has been interpreted narrowly so as to require the party seeking discovery to prove that the person identified as the plaintiff or the defendant is a nominal party who is participating in the action at the instigation of, or solely to benefit, another person from whom discovery is sought.[8] That the unnamed person may obtain a material advantage from the action is not sufficient to subject him to discovery.[9]

In addition to oral examination, a party may obtain discovery of another party by requiring production of documents "that are or have been in his possession, custody or power relating to any matters in question in the action".[10] A party, on notice to the solicitor of the opposite party, also may obtain production for the purpose of "inspection of any document referred to in a special endorsement on a writ of summons, the pleadings, or affidavits,

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[6] The Rules of Civil Procedure proposed by the Civil Procedure Revision Committee would effect substantial changes to the present rules governing discovery: see Province of Ontario, Ministry of the Attorney General, Civil Procedure Revision Committee, untitled report (June 1980), Proposed Rules of Civil Procedure (hereinafter referred to as "Williston Committee Rules"). Rule 32.04, for example, would allow a party to choose to conduct discovery by written questions and answers, instead of by the more familiar oral examination for discovery. This procedure is analogous to the interrogatory procedure available under r. 33 of the United States Federal Rules of Civil Procedure: see discussion, *infra*, this ch., sec. 3.

[7] *Supra*, note 1, r. 334.

[8] See, generally, Williston and Rolls, *supra*, note 4, at 764-67.

[9] See *Regalcrest Builders Inc. v. Somjan Investments Ltd.* (1978), 7 C.P.C. 168 (Ont. H.C.J.), rev'g 6 C.P.C. 177 (Master S.C.O.).

[10] *Supra*, note 1, r. 347.

and is entitled to make copies of them".[11] Rule 349 provides that, at the instance of a party, the court may order production and inspection of documents that are in the possession of a person who is not a party to the action. Although, on its face, this Rule might appear to confer a general right of documentary discovery against non-parties, it has been interpreted restrictively.[12]

It should be noted that the Rules of Practice authorize a court, in limited circumstances, to sever discovery in an action. Where the right of discovery depends upon the determination of an issue or question in dispute, the court, at the request of a party, may order that discovery be postponed pending the determination of that issue or question.[13]

The Ontario Rules of Practice grant the court a discretion to impose sanctions in the event that a party does not comply with a request for discovery, for example, by failing to attend an oral examination, or by refusing to produce documents. Among the sanctions that may be applied is dismissal of the action, where the recalcitrant party is the plaintiff, or striking out the defence, where the defendant is not being cooperative.[14] Usually, a failure to attend oral examination for discovery is met with an order for re-attendance.[15] The more extreme sanction of striking out pleadings is not used "unless the failure to attend is clearly without sufficient excuse and is in fact wilful".[16]

There has been scant discussion of discovery in class actions in the Ontario jurisprudence. The only context in which discovery has been considered is in relation to class actions requiring individual assessment of damages; in such cases, courts have cited the inability of the defendant to obtain discovery of absent class members as one reason for disallowing such class actions.[17] In *Farnham v. Fingold*,[18] for example, Jessup J.A. commented

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[11] *Ibid.*, r. 350(1), and also r. 348.

[12] See, for example, *McCurdy v. Oak Tire and Rubber Co. Limited* (1918), 44 O.L.R. 235 (H.C. Div.), at 235; *Trustee of the Property of Lang Shirt Co. Ltd. v. London Life Insurance Co.* (1926), 31 O.W.N. 285 (Master S.C.O.), at 286; *Doig v. Hemphill*, [1942] O.W.N. 391 (Master S.C.O.), at 391-92; and *Jameson v. Margetson* (1975), 11 O.R. (2d) 175 (Co. Ct.), at 176.

[13] *Supra*, note 1, r. 351. The case law indicates that this discretion is to be exercised only in very narrow circumstances: see, for example, *Minshall v. Minshall* (1974), 4 O.R. (2d) 319, at 320, 15 R.F.L. 129 (H.C.J.), and *Gibson v. Bagnall (No. 2)* (1979), 24 O.R. (2d) 567, at 571, 98 D.L.R. (2d) 760 (H.C.J.).

[14] *Supra*, note 1, rr. 330 and 352.

[15] See Williston and Rolls, *supra*, note 4, at 868-73.

[16] *Ibid.*, at 871.

[17] The other reason usually given is that, if the class action fails, the defendant may obtain his costs from the representative plaintiff only, while the class members enjoy a costs immunity, although they would have shared in the fruits of the action had it been successful: see discussion *supra*, ch. 2, sec. 2(c)(iii)e.

[18] [1973] 2 O.R. 132, 33 D.L.R. (3d) 156 (C.A.) (subsequent references are to [1973] 2 O.R.). This argument was presented earlier in *Markt & Co., Ltd. v. Knight Steamship Co., Ltd.*, [1910] 2 K.B. 1021 (C.A.), at 1039.

as follows:[19]

> Rule 75 should be applied to particular cases to produce an expeditious but just result. Thus, where the members of a class have damages that must be separately assessed, it would be unjust to permit them to be claimed in a class action because the defendant would be deprived of individual discoveries. . . .

While the courts appear to have assumed that, as a general principle, absent class members are not subject to discovery at the behest of the defendant, they have not explicitly articulated their reasons for this view. Presumably, the immunity arises from the fact that, except for the representative plaintiff, class members are not considered to be parties to a class action and, as we have explained, generally under the Rules of Practice only parties are subject to discovery.

3. DISCOVERY UNDER RULE 23

Rule 23 of the United States Federal Rules of Civil Procedure makes no reference to discovery. Accordingly, the courts have been obliged to consider the application to class actions of the Federal Rules of Civil Procedure governing discovery in ordinary actions brought in the federal courts.[20]

A significant distinction between the Federal Rules of Civil Procedure and the Supreme Court of Ontario Rules of Practice is that the former provide for discovery of both parties and non-parties, while the latter generally restrict discovery to parties. Under the Federal Rules, however, the kind of discovery that is available depends upon whether the person from whom it is sought is a party or a non-party.

A party may secure discovery of another party by one or more methods. For our purposes, it is important to note two of these methods.[21] First, a

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[19] *Farnham v. Fingold, supra*, note 18, at 136. That the defendant may not obtain discovery of absent class members has been noted in other Ontario decisions: see, for example, *Northdown Drywall & Construction Ltd. v. Austin Co. Ltd.* (1975), 8 O.R. (2d) 691, at 693, 59 D.L.R. (3d) 55 (Div. Ct.); *York Condominium Corp. No. 104 v. Halliwell Terrace Ltd.* (1975), 12 O.R. (2d) 46 (H.C.J.), at 49; and *Naken v. General Motors of Canada Ltd.* (1978), 21 O.R. (2d) 780, 92 D.L.R. (3d) 100 (C.A.).

> Apparently no consideration has been given to whether the application of r. 333(1) of the Rules of Practice would render individual members of a class subject to examination for discovery by the defendant: see Williams, "Consumer Class Actions in Canada – Some Proposals for Reform" (1975), 13 Osgoode Hall L.J. 1, at 41, *n.* 131 (hereinafter referred to as "Williams Consumer Class Actions"). It also should be noted that the rules proposed by the Civil Procedure Revision Committee include a provision that is almost identical to r. 333(1): see Williston Committee Rules, *supra*, note 6, r. 32.02(8).

[20] Fed. R. Civ. P. 26-37. See, generally, Wright, *Law of Federal Courts* (3d ed., 1976), §§81-90, at 398-443.

[21] A party also may be requested to produce documents, to allow inspection and testing of tangible things in his possession, control, or custody, or to permit entry upon land or other property in his possession and control. In addition, the court may order a party to submit to a mental or physical examination. Finally, a party may make a written request that the opposing party admit the truth of any matters that are within the ambit of discovery: see Fed. R. Civ. P. 34-36.

party may be discovered by deposition, either by oral examination[22] or by written questions.[23] In a sense, deposition procedures are analogous to oral examination for discovery in Ontario, insofar as a party must attend to give answers under oath to questions that may be posed in person by opposing counsel or that may have been served earlier. Secondly, a party may be obliged to respond to written questions, called interrogatories, which must be answered in writing under oath within thirty days of their delivery.[24] A person who is not a party may be subjected to discovery only by deposition, either by oral examination or by written questions.

Discovery by interrogatories and discovery by depositions, particularly upon written questions, appear to be very similar procedures, in that both culminate in a document that records the answers of the person being examined. Interrogatories, however, are answered by written replies, whereas oral responses are given to depositions. When depositions are taken, the oral testimony is recorded, and may be transcribed and presented later to the deponent for acknowledgment.[25] The procedure for deposition by written questions is intended as an alternative to oral deposition in circumstances where it would be inconvenient for the party seeking discovery to attend in person to question the deponent.[26] Despite the similarity between the procedures, discovery by interrogatories is employed frequently, while the written deposition method is used rarely.[27] The reason is that the latter procedure is substantially more costly than the former for the discovering party.[28]

In the event of a failure to comply with these discovery procedures, a court may choose from a range of sanctions, including dismissal of the action, where the uncooperative party is the plaintiff, or rendering a judgment by default, where the defendant is the disobedient party.[29]

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[22] Fed. R. Civ. P. 30.

[23] Fed. R. Civ. P. 31.

[24] Fed. R. Civ. P. 33.

[25] Fed. R. Civ. P. 30(c) and 31(b).

[26] See Wright, *supra*, note 20, §85, at 423.

[27] See Wright and Miller, *Federal Practice and Procedure* (1972), Vol. 8, §2131, at 442.

[28] See Wright and Miller, *ibid.*, §2163, at 486, and Note, "Developments in the Law – Class Actions" (1976), 89 Harv. L. Rev. 1318, at 1446, *n.* 272 (hereinafter referred to as "Harvard Developments"). In Note, "Party Discovery Techniques: A Threat to Underlying Federal Policies" (1974), 68 Nw. U. L. Rev. 1063, at 1077, *n.* 89 (hereinafter referred to as "Party Discovery Techniques"), the greater cost of depositions is explained:

> The usual cost factors for the rule 31 written deposition include a fee for the officer taking the deposition, an hourly fee for the reporter, a witness fee for a non-party, the per page expense for the original and copies of the typed manuscript, and of course, the professional time of counsel spent in preparing the questions. Oral depositions under rule 30 would of course increase the expenditure of counsel's time. By comparison, the main cost in the use of interrogatories, other than the professional time spent in their preparation, would be the cost of service.

[29] Fed. R. Civ. P. 37.

Because interrogatories are more expeditious, less expensive, and less cumbersome for the party seeking discovery, a defendant, if afforded a choice, would prefer to employ this method of discovery, instead of proceeding by way of deposition. In class actions in the United States, defendants who have sought to discover absent class members have ordinarily attempted to serve interrogatories upon them. Moreover, they have asked the court to dismiss the claims of those who fail to answer. By employing this discovery procedure, and by calling for the application of this sanction, defendants have assumed that class members are parties to the action, and have treated them as such. This has caused some courts and commentators, when considering the question whether class members should be subject to discovery, to focus upon the rather technical question whether class members, other than the class plaintiff, can be regarded as "parties".

It is at the common questions stage of class actions that defendants ordinarily have attempted to obtain discovery of class members by employing interrogatories. Courts have approached the issue of the propriety of this discovery method at the common questions stage of the proceedings in two ways. The majority of decisions in which the issue has been examined assert that the court seized with the class action has a discretion to permit the use of interrogatories in appropriate circumstances.[30] A second group of cases has held that, as a rule, a defendant should not be able to serve interrogatories on class members other than the representative plaintiff prior to a determination of the common questions.[31]

Turning to the cases that have permitted discovery of absent class members, the first case to consider this issue was *Brennan v. Midwestern United Life Insurance Co.*[32] In that case, the Court of Appeals for the Seventh Circuit held that a trial judge has a discretion to authorize the use of interrogatories. It stated that discovery should be allowed where it is "necessary or helpful" and that, while it should not be permitted as a matter of course, it is proper where "the trial judge determines that justice to all parties requires that absent parties furnish certain information".[33]

Later cases have provided a somewhat better indication of the circumstances in which discovery of absent class members by means of interrogatories would be appropriate. Several courts have asserted that interrogatories

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[30] See *Brennan v. Midwestern United Life Insurance Co.*, 450 F.2d 999 (7th Cir. 1971), *cert.* denied 405 U.S. 921 (1972); *Bisgeier v. Fotomat Corp.*, 62 F.R.D. 118 (N.D. Ill. 1973); *Clark v. Universal Builders, Inc.*, 501 F.2d 324 (7th Cir. 1974); and *Robertson v. National Basketball Association*, 67 F.R.D. 691 (S.D.N.Y. 1975), at 700-01.

[31] See *Fischer v. Wolfinbarger*, 55 F.R.D. 129 (W.D. Ky. 1971); *Wainwright v. Kraftco Corp.*, 54 F.R.D. 532 (N.D. Ga. 1972); and *Hawkins v. Holiday Inns, Inc.*, 1977-1 Trade Cases ¶61,310 (W.D. Tenn. 1977).

[32] *Supra*, note 30. For commentary, see Note, "Federal Civil Procedure – Discovery Available Against Absent Plaintiffs to a Class Action" (1972), 21 J. Pub. L. 189 (hereinafter referred to as "Discovery Available Against Absent Plaintiffs"); Note, "Civil Procedure: Absentee Class Members Subjected to Discovery and Claims Dismissed for Failure to Respond", [1971] Duke L.J. 1007 (hereinafter referred to as "Claims Dismissed for Failure to Respond"); and Party Discovery Techniques, *supra*, note 28.

[33] *Brennan v. Midwestern United Life Insurance Co., supra*, note 30, at 1005.

may be allowed if directed to the common questions, but are premature if concerned with individual issues peculiar to the class members.[34] A few courts have commented that questions relating to individual damages are premature where there is a possibility of bifurcating the class action to allow subsequent proceedings once the liability of the defendant has been determined.[35] Some courts have noted that, in most cases, the representative plaintiff will have the information concerning the only relevant issues, that is, the common questions. Discovery of the other class members, therefore, would be unnecessary.[36]

In addition to recognizing the fact that discovery of absent class members at the common questions stage of a class action will usually be irrelevant, some courts have expressed concern that discovery of absent class members is inherently inconsistent with the very concept of a class action. According to this view, a basic policy of Rule 23 is to permit class members to secure the benefits of the judgment without having to take active measures. Therefore, subjecting hitherto passive class members to requests for discovery, under the threat of dismissal of their claims,[37] was thought to undermine this rationale, since the class members would be required to take action as a prerequisite to obtaining relief.[38]

Finally, courts have evinced a concern that uncontrolled discovery might lead to abusive behaviour by defendants, which would be detrimental to class members. The danger of abuse, it has been explained, lies in the defendant seeking to serve interrogatories, not to obtain information about the opposing

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[34] *Bisgeier v. Fotomat Corp.*, *supra*, note 30, at 119-20; *Gardner v. Awards Marketing Corp.*, 55 F.R.D. 460 (D. Utah 1972), at 463-64; *Dellums v. Powell*, 566 F.2d 167 (D.C. Cir. 1977), at 187; *United States v. Trucking Employers, Inc.*, 72 F.R.D. 101 (D.C. 1976), at 104; *Robertson v. National Basketball Association*, *supra*, note 30, at 699-700; and *Enterprise Wall Paper Mfg. Co. v. Bodman*, 85 F.R.D. 325 (S.D.N.Y. 1980), at 327.

[35] See *Bisgeier v. Fotomat Corp.*, *supra*, note 30, at 119-20; *Gardner v. Awards Marketing Corp.*, *supra*, note 34, at 463-64; and *Robertson v. National Basketball Association*, *supra*, note 30, at 699-700.

[36] *Gardner v. Awards Marketing Corp.*, *supra*, note 34, at 464, and *Dellums v. Powell*, *supra*, note 34, at 187.

[37] The courts are divided on the appropriateness of applying sanctions. While the Court in *Robertson v. National Basketball Association*, *supra*, note 30, at 700-01, was opposed to the use of such sanctions, in most other cases the courts seem to have approved of the use of sanctions against class members who fail to respond to a request for interrogatories: see, for example, *Brennan v. Midwestern United Life Insurance Co.*, *supra*, note 30.

[38] *Gardner v. Awards Marketing Corp.*, *supra*, note 34, at 462-63. In *Bisgeier v. Fotomat Corp.*, *supra*, note 30, at 119, the District Court stated that discovery of absent class members "challenges the concept which is fundamental to the effective conduct of class actions under Rule 23(b)(3). The rule contemplates that the represented members of the class will benefit from, and be bound by, the judgment in the action, 'without the burden of actually participating' ". Commentators also have argued that to allow discovery of absent class members before the determination of the common questions would contradict the policy of Rule 23 to provide a forum for persons whose small claims would otherwise preclude redress: see, for example, Party Discovery Techniques, *supra*, note 28, at 1075-76; Discovery Available Against Absent Plaintiffs, *supra*, note 32, at 196; Note, "Requests for Information in Class Actions" (1974), 83 Yale L.J. 602, at 609-10 (hereinafter referred to as "Requests for Information"); and Claims Dismissed For Failure to Respond, *supra*, note 32, at 1014.

case, but as "a tactic to take undue advantage of the class members or as a stratagem to reduce the number of claimants".[39] Confident that many class members would ignore demands for information, a defendant would be encouraged to make discovery requests of the entire class in the expectation that the inevitable failures to respond would result in the dismissal of claims, thereby diminishing the amount of his liability.

As indicated, a second group of cases has refused to permit defendants to obtain discovery of absent class members by means of interrogatories. Courts imposing this prohibition have declared that class members are not "parties",[40] a characterization that would render interrogatories unavailable. Among the few cases that have adopted this position, at least one has gone further and articulated the policy reasons behind the refusal to permit interrogatories. In *Wainwright v. Kraftco Corp.*,[41] the Court explained that "[t]he usefulness of Rule 23 would end if class members could be subjected to Rule 33 and forced to spend time, and perhaps engage legal counsel, to answer detailed interrogatories".[42]

It should be emphasized that none of the cases has held that a defendant should have an unqualified right to obtain discovery of absent class members before the common questions have been decided. Courts that have sanctioned the use of interrogatories at the common questions stage of the litigation invariably have stated that the availability of this discovery method is to be circumscribed by judicial control.[43]

Commentators in the United States have agreed with the dominant trend in the case law, that is, that discovery of class members other than the representative plaintiff prior to the determination of the common questions should be subject to judicial control. In support of this position, they have relied upon the same policy arguments found in the decisions. In particular,

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[39] *Brennan v. Midwestern United Life Insurance Co., supra*, note 30, at 1005. See, also, *Bisgeier v. Fotomat Corp., supra*, note 30, at 121, and *Clark v. Universal Builders Inc., supra*, note 30, at 340. And see Wright and Miller, *supra*, note 27, Vol. 7A, §1792, at 195-96, *n.* 96; Harvard Developments, *supra*, note 28, at 1444; Committee Report, "Class Actions – Recommendations Regarding Absent Class Members and Proposed Opt-In Requirements" (1973), 28 Record 897, at 906; and Note, "Federal Rules of Civil Procedure – Class Actions – Discovery – Claims of Absent Members of Class Dismissed for Failure to Respond to Interrogatories" (1972), 40 Fordham L. Rev. 969, at 977.

[40] *Wainwright v. Kraftco Corp., supra*, note 31; *Hawkins v. Holiday Inns, Inc., supra*, note 31; and *Fischer v. Wolfinbarger, supra*, note 31. In the *Fischer* case, at 132, there is merely a terse statement that "[i]t is not intended that members of the class should be treated as if they were parties plaintiff, subject to the normal discovery procedures, because if they were permitted, then the reason for the rule would fail".

[41] *Supra*, note 31.

[42] *Ibid.*, at 534.

[43] *Brennan v. Midwestern United Life Insurance Co., supra*, note 30, at 1004-05; *Bisgeier v. Fotomat Corp., supra*, note 30, at 120; *Gardner v. Awards Marketing Corp., supra*, note 34, at 462; *United States v. Trucking Enterprises Inc., supra*, note 34, at 104; *Dellums v. Powell, supra*, note 34, at 187; *Blackie v. Barrack*, 524 F.2d 891 (9th Cir. 1975), at 907, *n.* 22; *Clark v. Universal Builders Inc., supra*, note 30, at 340-41; *Robertson v. National Basketball Association, supra*, note 30, at 699; and *Enterprise Wall Paper Mfg. Co. v. Bodman, supra*, note 34, at 327.

with respect to discovery at the common questions stage of a class action, it has been suggested that only if the requisite information is unavailable from the class plaintiff or some other source should limited discovery of absent class members be allowed.[44]

A concern of certain commentators that does not appear to have been articulated by the courts is that unrestricted discovery of class members would be destructive of the economies that a class action is intended to achieve through asserting similar claims in a single action.[45] For example, it is argued that to permit widespread discovery on individual issues, such as reliance or damages, prior to deciding the common questions, would be a waste of time and expense for all concerned if the common questions were not ultimately decided in favour of the class.

4. OTHER CLASS ACTION MECHANISMS

Several class action statutes and rules that we have reviewed have attempted to address the issues that have arisen as a consequence of the

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[44] For commentary, see Harvard Developments, *supra*, note 28, at 1445; Newberg, *Newberg on Class Actions* (1977), Vol. 5, §8844, at 935; Party Discovery Techniques, *supra*, note 28, at 1082; Discovery Available Against Absent Plaintiffs, *supra*, note 32, at 197; and Requests for Information, *supra*, note 38, at 611-13, 614, and 616-17.

In Frankel, "Some Preliminary Observations Concerning Civil Rule 23", 43 F.R.D. 39 (1967), at 47, the author presents the following argument:

> In the cases . . . under (b)(3) – i.e., having both common issues and issues affecting separately the individual members of the class – district judges have apparently thought that all members of the class would have to be brought before the court – for discovery as well as trial – before there could be any judgment affecting the class as a whole. Insofar as this premise lurks in the cited cases, it would appear to be unwarranted. Take, for example, the simple model of the case by an alleged class of securities purchasers charging fraudulent representations. There are, supposedly, common questions as to the nature of the alleged representations, falsity, and materiality. If some or all such questions are decided against the plaintiff class, the complaint will be dismissed and, always assuming adequate representation of the class, there will be a judgment binding the class without requiring any but the representative members to have been before the court.
>
> On the other hand, if the plaintiff class prevails on the common questions, it will then – but only then – become necessary to try or settle or otherwise dispose of individual questions like reliance, damages, or the like. If the common questions have been aptly defined, there should be no need at an earlier stage to have all the individual class members before the court for discovery or any other purpose.

[45] In Party Discovery Techniques, *supra*, note 28, at 1075 (footnotes omitted), there is the following comment:

> Rule 23 was intended to provide an efficient and economical procedure for the adjudication of numerous claims involving common issues. Allowing the use of party discovery techniques against class members would adversely affect the desired economies both through the increased activity required of the class members and through the processing of the potentially voluminous and redundant information collected. Such a procedure would be a step away from the ideal of unified litigation of common questions, perhaps to the extent of 'emasculating' the class action.

See, also, DuVal, "The Class Action as an Antitrust Enforcement Device: The Chicago Experience (I)", [1976] ABF Res. J. 1021, at 1069-72, and DuVal, "The Class Action as an Antitrust Enforcement Device: The Chicago Experience (II)", [1976] ABF Res. J. 1273, at 1349-50. This study is described *supra*, ch. 4, sec. 1(b)(iii).

failure of Rule 23 to deal with discovery. For example, Rule 42 of the Texas Rules of Civil Procedure is very similar to Rule 23. Unlike Rule 23, however, Rule 42 has dealt expressly with the problems caused by defendants seeking discovery of absent class members by providing that "[u]nnamed members of a class are not to be considered as parties for the purposes of discovery".[46]

Section 10 of the American Uniform Class Actions Act[47] provides that discovery either by or against the representative plaintiff is governed by the rules that control discovery as between the parties to an ordinary civil action. By contrast, a defendant may obtain discovery of absent class members only with the consent of the court. In deciding whether to grant consent, the court is required to consider the following non-exhaustive list of factors:[48] (1) "the timing of the request [for discovery]"; (2) "the subject matter to be covered"; (3) "whether representatives of the class are seeking discovery on the subject to be covered"; and (4) "whether discovery will result in annoyance, oppression or undue burden or expense for the member of the class".

The first three matters direct the court's attention to the issue whether discovery is necessary at the particular stage of the proceedings at which it is sought. It should be noted that, although these factors bear directly upon the question of the defendant's need for discovery, they do not require the court to ascertain first whether this need can be met effectively by discovery of the representative plaintiff. The fourth factor – "whether discovery will result in annoyance, oppression or undue burden or expense for the member of the class" – would appear to require the court to balance the need of the defendant for discovery against the expense and inconvenience that discovery will inevitably impose upon class members.

Under a recent proposal put forth by the Office for Improvements in the Administration of Justice of the United States Department of Justice – Bill H.R. 5103[49] – discovery would be restricted both before certification and prior to the other stages of a class action, including any individual proceedings.[50] Pre-certification discovery would be limited by the imposition of

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[46] Tex. R. Civ. P. 42(f). Neither art. 9 of the New York Civil Practice Law and Rules (McKinney) nor the Illinois Civil Practice Act, Ill. Ann. Stat. ch. 110 (Smith-Hurd 1981 Supp.) addresses the question of discovery.

[47] National Conference of Commissioners on Uniform State Laws, Uniform Class Actions Act, Uniform Laws Ann. (1975), Vol. 12 (Cum. Supp. 1981), at 20 (hereinafter referred to as "U.C.A.A.").

[48] *Ibid.*, §10(a).

[49] Small Business Judicial Access Act of 1979, United States Department of Justice, Office for Improvements in the Administration of Justice, Bill H.R. 5103, 96th Cong., 1st Sess. (1979) (hereinafter referred to as "O.I.A.J. Bill H.R. 5103"). The predecessor to this Bill was a Bill To provide for the reform of class action litigation procedures, United States Department of Justice, Office for Improvements in the Administration of Justice, Bill S. 3475, 95th Cong., 2d Sess. (1978) (hereinafter referred to as "O.I.A.J. Bill S. 3475").

[50] O.I.A.J. Bill H.R. 5103, *supra*, note 49, §3021(a). Section 3012(a) of O.I.A.J. Bill S. 3475, *supra*, note 49, was similar in its approach to discovery, although it did impose somewhat different controls. For example, interrogatories were not subject to a numerical restriction, but to a condition that they be "submitted solely for the purpose of identifying and locating persons to be deposed and documents to be requested".

restrictions on the number of interrogatories, depositions, and requests for production of documents available to the class representative and to the defendant. Moreover, recognizing the dangers inherent in allowing the defendant to discover class members as of right,[51] Bill H.R. 5103 required that the prior consent of the court be secured in all cases. In order to obtain leave of the court, the party seeking discovery would have to demonstrate "substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means".[52] These prerequisites would appear to oblige the defendant to look first to the representative plaintiff or other sources for the information that he requires; only if it could not otherwise be obtained could the defendant seek discovery of the other class members.

Bill H.R. 5103 also addressed the issue of the sanctions that should be imposed in the event of a failure to respond to a request for discovery. It stipulated that class members who fail to respond could be denied recovery only "where the court determines that no other sanction is adequate to protect the interest of the person seeking discovery".[53] This restriction indicates an awareness that, in the context of class litigation, the silence of absent class members may be attributed to reasons other than deliberate recalcitrance. In this respect, Bill H.R. 5103 has taken an approach to discovery that is sensitive to the peculiar nature of the class suit and the expected role of the class, and one that is consistent with an "access to justice" rationale.[54]

Article 1019 of the Quebec *Code of Civil Procedure*[55] provides that, prior to the determination of the common questions, class members other than the class plaintiff or an intervenor cannot be subjected to "examination on discovery", except with the consent of the court. This general prohibition would appear to constitute a safeguard against unnecessary discovery by the defendant. However, this objective may be undermined by the relatively low threshold test that must be met before a court will permit discovery. A defendant need only demonstrate that it would be "useful to the adjudication of the questions of law or fact dealt with collectively", that is to say, the common questions. In many cases, class members would possess information

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[51] The drafters of O.I.A.J. Bill H.R. 5103 stated that "[u]nder existing law there is an incentive for defendants to winnow-down the class, that is, to exclude by means of discovery sanctions those who do not respond": see United States Department of Justice, Office for Improvements in the Administration of Justice, *H.R. 5103-Bill Commentary: The Case for Comprehensive Revision of Federal Class Damage Procedure* (1979), at 57 (footnotes omitted).

[52] O.I.A.J. Bill H.R. 5103, *supra*, note 49, §3021(b).

[53] *Ibid.* Section 3012(b) of O.I.A.J. Bill S. 3475, *supra*, note 49, provided simply that "[f]ailure of an injured person to respond to such discovery shall not be grounds for excluding him from the class".

[54] The class action legislation under consideration by a committee of the Section of Litigation of the American Bar Association is identical to O.I.A.J. Bill H.R. 5103: see American Bar Association, Section of Litigation, *Proposed Class Action Legislation* (tentative draft, May 1980), §3003.

[55] R.S.Q. 1977, c. C-25, as enacted by S.Q. 1978, c. 8, s. 3.

that might be "useful" to this determination; in almost all cases, however, the representative plaintiff also would possess this information.

The various class action mechanisms drafted or influenced by Professor Williams[56] reflect a recognition of the fact that different policy considerations apply to the question of discovery, depending on the stage of the class proceedings at which it is sought. In Professor Williams' view, prior to a finding of the defendant's liability, discovery of class members is unnecessary, and should be either prohibited or greatly restricted. Following a determination of the common questions in favour of the class, on the other hand, fairness to the defendant would require that he be allowed discovery in all cases in order to challenge the claims of individual class members.[57] Accordingly, the class action mechanisms proposed or influenced by Professor Williams provide that, after the common issues have been decided in favour of the class, and if subsequent proceedings are necessary to determine individual claims, the defendant and the class members have the same rights of discovery against each other as parties in an ordinary civil action.[58]

5. PROPOSALS FOR REFORM IN ONTARIO

Having reviewed the relevant case law in the United States, and having surveyed the legislative solutions contained in various proposed and enacted class action mechanisms, we turn now to discuss the approach to discovery that should be adopted in the proposed *Class Actions Act*.

In the introduction to this chapter, we indicated that, in deciding whether, and the extent to which, absent class members should be subject to discovery, it is necessary to balance two competing interests: the interest of class members in securing redress without being obliged to take unnecessary action, and that of the defendant in being able to present his case effectively. We also stated our view that the question of discovery must be considered in relation to each of the stages of a class action. Accordingly, we shall proceed to discuss the issue separately in the context of each of these stages.

(a) Certification

In chapter 10 of this Report, this Commission considered and rejected

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[56] Law Reform Committee of South Australia, "Draft Bill for a Class Actions Act", in *Thirty-sixth Report Relating to Class Actions* (1977), at 12 (hereinafter referred to as "South Australia Draft Bill"); Williams, "Model Consumer Class Actions Act", in "Consumer Class Actions in Canada – Some Proposals for Reform" (1975), 13 Osgoode Hall L.J. 1, at 65 (hereinafter referred to as "Williams' Model Act"); *An Act to Amend the Combines Investigation Act*, Bill C-42, 1977 (30th Parl. 2d Sess.) (hereinafter referred to as "Bill C-42"); *An Act to Amend the Combines Investigation Act*, Bill C-13, 1977 (30th Parl. 3d Sess.) (hereinafter referred to as "Bill C-13"); and Williams, "Damages Class Action Under the Combines Investigation Act", in Williams and Whybrow, *A Proposal for Class Actions Under Competition Policy Legislation* (1976) (hereinafter referred to as "Williams Combines Class Actions").

[57] See Williams Consumer Class Actions, *supra*, note 19, at 41-42.

[58] South Australia Draft Bill, *supra*, note 56, s. 9(5); Bill C-42, *supra*, note 56, s. 39.21(*a*); Bill C-13 *supra*, note 56, s. 39.19(*a*); Williams' Model Act, *supra*, note 56, s. 9(5); and Williams Combines Class Actions, *supra*, note 56, s. 39.9(5).

the use of discovery prior to the hearing of the certification motion. It was our view that the gathering and presentation of evidence for certification should be governed generally by the Rules of Practice that apply to motions.[59]

On a motion, evidence ordinarily is placed before a court by means of affidavits, upon which the deponents may be cross-examined.[60] In addition, if leave is granted by the court, *viva voce* evidence may be presented at the hearing of the motion.[61] Under the Ontario Rules of Practice, a party may examine anyone as of right for the purpose of using a transcript of his evidence on an impending motion.[62] If this right were exercisable in the context of the certification motion, it would allow the defendant to compel the attendance of absent class members at an oral examination. The possibility that class members could be required to participate in this manner at this stage of the proceedings necessitates a consideration of the same issues that must be examined in considering the propriety of discovery prior to a determination of the common issues. Accordingly, the Commission has concluded that this question should be governed by the same principles that we shall recommend in the following section. It is to a discussion of discovery at the common questions stage of a class action that we now turn our attention.

(b) Common Proceedings

Insofar as discovery at the common questions stage of a class action is concerned, the Commission is of the opinion that the applicable provision in the *Class Actions Act* should implement three important principles.

First, we believe that the parties to class proceedings – the representative plaintiff and the defendant – should have the same rights of discovery against each other that are available in an ordinary action, and we so recommend.[63] This recommendation is but an articulation of the existing Ontario case law, which now permits discovery by and of the parties to a class action. In our opinion, the proposed *Class Actions Act* should contain an express provision to this effect in order to make it clear that this would continue to be the case under our revised class action procedure.

Secondly, it is our view that the defendant should not be entitled to

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[59] See *supra*, ch. 10, sec. 2.

[60] Rules of Practice, *supra*, note 1, rr. 228 and 229. See, also, Williston Committee Rules, *supra*, note 6, r. 39.

[61] Rules of Practice, *supra*, note 1, r. 231. See, also, Williston Committee Rules, *supra*, note 6, r. 39.02(2).

[62] Rules of Practice, *supra*, note 1, r. 230. See, also, Williston Committee Rules, *supra*, note 6, r. 39.02(1).

It appears that the Williston Committee Rules would limit more narrowly the use to which the transcript may be put, insofar as the evidence apparently can be used only upon the hearing of the motion before which it was taken. By contrast, under r. 230, the evidence may be used on "any motion".

[63] See Draft Bill, s. 21(*a*).

discover class members other than the representative plaintiff except with the prior consent of the court. Consistent with the position taken by courts in the United States, and with the views of commentators who have considered this issue, we do not believe that it is justifiable to impose the inconvenience and expense of discovery on absent class members when the needs of the defendant can be met by discovery of the class representative. Both before certification and prior to the trial of the common questions, it is probable that the class plaintiff will be in possession or control of the information relevant to the issues in dispute at the particular stage of the proceedings, and it is to him that the defendant should be obliged to look.[64] If, however, discovery of the representative plaintiff proves to be inadequate, the defendant should be able to apply to the court for permission to examine or discover other class members.

Accordingly, we recommend that the proposed *Class Actions Act* should provide that, before the questions common to the class are decided, a defendant should be able to apply to the court to discover members of the class other than the representative plaintiff, but only after he has discovered the representative plaintiff.[65] Similarly, we recommend that a defendant should not be able by subpoena to require a member of the class other than the representative plaintiff to attend to be examined for the purpose of using his evidence on any motion or application except by leave of the court, and following examination of the class plaintiff.[66] It should be noted that this

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[64] In the recent case of *Alberta Pork Producers Marketing Board v. Swift Canadian Co. Ltd.* (1981), 16 Alta. L.R. (2d) 313 (Q.B.), Dea J. noted that the defendant was unlikely to be prejudiced by the absence of any right of discovery against the absent class members. He commented as follows at 322:

> What might discovery in this case elicit? A member of the class could say that he sold a certain number of hogs through the plaintiff board on a number of occasions and received certain moneys. He could probably not say who bought the hogs, as everything was done through the plaintiff board. If asked about the conspiracy or the unlawful acts, he could only reply by giving information which he had received from the plaintiff board or elsewhere. Indeed, virtually all the evidence which the plaintiffs will have to call to prove the tort and to prove the damages will be known to the members of the class only as a result of what they have been told by someone else. At the same time, the defendants will have available for discovery the plaintiff board. The plaintiff board not only has all of the records for all of the transactions, it actually effected all of the transactions. It also will be a useful source of discovery on the issue of tort liability and damages; indeed, perhaps the only useful source on those issues.
>
> In the circumstances, is the denial of personal plaintiff discovery which is incidental to any representative action a disadvantage to the defendants? I think not. The practicalities of the situation are that what the defendants need is discovery of the plaintiff board. Discovery of the individual class plaintiffs by the defendants is neither needed nor desirable.

[65] See Draft Bill, s. 21(*b*). This is consistent with the views expressed in Harvard Developments, *supra*, note 28, at 1445 (footnotes omitted):

> As a basic principle, discovery of absentees should be discouraged because of the potential for abuse. The defendant should be required first to seek the necessary information from the class representative. In many cases, the class representative will be able to meet defendant's needs for information concerning common questions; discovery of information relating to individual claims can be deferred until the core question of liability is settled.

[66] Draft Bill, s. 21(*e*).

latter recommendation would apply not only to the certification motion, but to any motion or application brought during the course of a class action.

Thirdly, the Commission has concluded that the proposed *Class Actions Act* should contain a non-exhaustive list of factors designed to assist the court in deciding whether to allow discovery or examination of absent class members. Accordingly, we recommend that the court, in deciding whether to allow the defendant to examine or discover class members other than the representative plaintiff, should be required to consider all relevant factors, including the following four: the stage of the class proceedings and the issues to be determined thereat; whether discovery or examination is necessary for the purposes of the defence on the issues; where monetary relief is claimed, the approximate monetary value of the individual claims; and whether discovery or examination will result in oppression, undue annoyance, burden, or expense for the members of the class.[67]

The first two factors that we recommend a court should be required to consider are intended to ensure that the court takes into account the need of the defendant for information from absent class members at the particular stage of the proceedings. The third and fourth factors would direct the court's attention to the question whether discovery of absent class members would be appropriate in the circumstances of a particular case. While we recognize that some cost and inconvenience inevitably will inhere in discovery, we believe that, where the claims are small or the burdens imposed upon individual class members would be inordinate, discovery should be denied.

It should be emphasized, however, that, in recommending consideration of the third and fourth factors, we do not mean to preclude discovery of absent class members by the defendant in all cases where individual claims are small. By including in the fourth factor the qualifying adjective "undue", we intend that the court should balance the inconvenience to class members against the need of the defendant. The facts and issues in a particular class action may persuade a court that discovery of some class members does not constitute an "undue" burden or expense, notwithstanding the fact that their claims are for small amounts. For example, where the defendant may be exposed to an enormous liability based upon the accumulation of individual claims, but is unable to obtain from the class representative information necessary to prepare his defence on the issue of liability, discovery of some class members should be permitted. In such a case, the burden imposed upon the class members would not be "undue", in light of the pressing need of the defendant for the information.

Before we leave the subject of discovery prior to the determination of the common questions, we would like to comment briefly upon the converse of the issue that we have thus far discussed – that is, whether, and the extent to which, class members other than the representative plaintiff should be able to discover the defendant. It is our opinion that, prior to the determination of the questions common to the class, discovery should be conducted by the class plaintiff through the class lawyer. Discovery is merely one of the many tasks involved in acting as the representative plaintiff. Hence, we do not

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[67] *Ibid.*, s. 21(*c*) and s. 21(*e*).

believe that absent class members should be entitled to conduct discovery through their own lawyers any more than they should be entitled to cross-examine witnesses at the trial of the common questions. The responsibility for advancing the class action is that of the representative plaintiff. If class members are concerned about whether the class action is being prosecuted effectively by the class plaintiff, they may apply to the court to intervene in the class action.[68]

(c) Individual Proceedings

In both the United States and Canada, there is agreement among commentators that, once the common questions have been decided in favour of the class, different considerations apply to the question of discovery.[69] At the individual issues stage of a class action, discovery of class members by the defendant may well be appropriate. Although most of the commentary has concerned discovery respecting damage issues, the arguments raised are equally applicable to any individual question left to be resolved in the subsequent proceedings.[70]

In previous chapters, we explained that, where the common questions are decided in favour of the class, further proceedings may be necessary in order to determine whatever individual questions remain. These proceedings will be concerned with either individual distribution issues or individual liability issues. We deal in turn with discovery in relation to each type of proceeding.

Individual distribution issues will arise where the court has ordered an aggregate assessment of the amount of monetary relief for which the defendant is liable to the class. If the discrete shares of the individual class members cannot be calculated and distributed directly to those entitled, the court will be obliged to devise appropriate procedures for the distribution of the aggregate award. Since the fact and the amount of the defendant's liability have been ascertained, such proceedings need not be adversarial in character; rather, their purpose will be to facilitate recovery by as many class members as possible. Consequently, we have recommended that the court should be given a discretion to rely upon relatively informal, "administrative" procedures.[71] The responsibility for the allocation of an aggregate award may be entrusted to the class representative, his lawyer, or to a bipartisan committee of counsel, who will be responsible for verifying the merits of individual claims. In view of the non-adversarial character of proceedings concerned with the distribution of an aggregate award, the concept of discovery, in our opinion, is not appropriate.[72] If there is a need to secure

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[68] For a discussion of intervention, see *supra*, ch. 8, sec. 4(d).

[69] See Harvard Developments, *supra*, note 28, at 1445; Newberg, *supra*, note 44, at 935; Party Discovery Techniques, *supra*, note 28, at 1083-84; Williams Consumer Class Actions, *supra*, note 19, at 41-42; and Frankel, *supra*, note 44, at 47.

[70] For example, the only remaining issue to be determined may be one of reliance, as in *Naken v. General Motors of Canada Ltd.*, *supra*, note 19.

[71] *Supra*, ch. 14, sec. 3(c)(iii).

[72] Any discovery that would have been necessary in relation to monetary relief would have concerned the aggregate assessment, a common question, and would have occurred before a determination of the liability of the defendant.

information for the purpose of processing or verifying claims, the court would have the power, under the provision that we have recommended for the conduct of proceedings concerned with the distribution of an aggregate award,[73] to order that such information be made available.

By contrast, where the trial of the common questions does not resolve all the issues bearing upon the liability of the defendant, individual liability issues will remain to be determined. Proceedings designed to resolve individual questions of liability will be adversarial in nature and will be designed to determine whether, or in what amount, the defendant is liable to a particular class member.

These proceedings will be akin to ordinary civil trials, as each class member wishing to secure redress from the defendant will have to establish his own claim. In the previous chapter, we recommended that the court should be given a discretion to determine the nature of the individual proceedings, subject to the condition that any procedures ordered be consistent with justice to the class members, the defendant, and the class representative.[74] We also recommended that the court should be empowered to dispense with any procedure that it considers unnecessary and to direct special procedures. While, in some cases, in the exercise of its discretion, the court may order a trial-like hearing, in other cases it may order substantially less formal proceedings. Regardless of the particular type of proceeding ordered, the adversarial nature of individual proceedings makes it appropriate to inquire whether discovery should be available to the individual class members and the defendant, as it would be if they were parties to an ordinary civil action.

The various commentators who have expressed support for the proposition that discovery of class members should be sanctioned only after a determination of the common questions seem to have assumed that such discovery should follow automatically when individual questions remain for adjudication. Although there is a stronger case in favour of allowing discovery as of right by and of absent class members in individual proceedings, we have concluded that courts should have a discretion to decide whether discovery should be allowed, and we so recommend.[75] In this regard, we differ from a number of proposed class action mechanisms that would give the defendant and the class members the same rights of discovery against each other as parties in an ordinary civil action.[76]

While we agree that different considerations apply to the issue of discovery of class members after the common questions have been determined, and that ordinarily a right of discovery will be appropriate, for two reasons we do not believe that this should invariably be the case. First, the amount of the individual claim in issue may not justify the additional

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[73] See *supra*, ch. 14, sec. 3(c)(iii).

[74] *Supra*, ch. 15, sec. 2(b).

[75] See Draft Bill, s. 31(2).

[76] See discussion, *supra*, this ch., sec. 4.

financial burden that discovery would place on all the participants in the class proceedings. For example, obliging absent class members to attend an examination for discovery or to respond to requests for documents would increase the cost of pursuing a claim, particularly if, as a consequence, the class member were required to retain a lawyer. Where this converts an individually nonrecoverable claim into a nonviable claim, it will defeat the purpose of facilitating compensation for persons with meritorious claims that are too small to permit them to secure relief through individual actions. Secondly, unnecessary discovery procedures could be employed as an instrument of harassment by a defendant. Repeated requests for documents, or requiring personal attendance at an examination for discovery, might intimidate class members and persuade them that it would be too much trouble to assert their claims.

As a matter of first impression, it might appear unfair to deny to the defendant an opportunity to discover class members before he opposes them in adversarial proceedings. We suggest, however, that the proposal to render the availability of discovery at the individual issues stage of a class action subject to judicial discretion is consistent with policies that have been adopted by the Legislative Assembly of Ontario to govern the resolution of disputes in other contexts. In certain circumstances, the Legislature has provided that the parties to a dispute should not be entitled to discover one another as of right, but must apply to the court for permission to do so.

For example, in actions brought pursuant to the *Small Claims Courts Act*,[77] examination for discovery is unavailable. Moreover, a party who wishes to obtain production and inspection of documents[78] must apply to the court for an order permitting him to do so. Restricting discovery in this manner reflects the view of the Legislature that the application of the ordinary discovery procedures prescribed by the Supreme Court of Ontario Rules of Practice[79] is inconsistent with the general policy of the *Small Claims Courts Act* to provide a relatively simple forum for resolving disputes within its monetary jurisdiction of $1,000.[80] Although the parties may be denied the advantages of discovery, it evidently was thought that the risk of any consequential prejudice was outweighed by the inevitable complexity and expense of discovery.

Similar restrictions upon rights of discovery may be found in the *Provincial Court (Civil Division) Project Act*.[81] The purpose of this Act is to establish and to conduct a pilot project using a limited class of civil actions with the goal of developing simplified procedures and methods that will make

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[77] R.S.O. 1980, c. 476.

[78] Small claims court Rules of Procedure, R.R.O. 1980, Reg. 917, r. 33.

[79] *Supra*, note 1, rr. 326-52.

[80] See *Rajakaruna v. Air France* (1979), 25 O.R. (2d) 156, at 157-58, 11 C.P.C. 172 (H.C.J.).

[81] *Provincial Court (Civil Division) Project Act*, R.S.O. 1980, c. 397. This statute replaces the small claims courts in the Municipality of Metropolitan Toronto with a new court, the Provincial Court (Civil Division) of The Municipality of Metropolitan Toronto,

civil remedies more accessible and reduce delays.[82] Like the *Small Claims Courts Act*, the *Provincial Court (Civil Division) Project Act* reflects a policy that disputes within its monetary jurisdiction should be determined in an inexpensive, expeditious, and just manner that will not oblige parties to retain the services of a lawyer.

One stated aim of the Act – to afford greater accessibility to the courts – is identical to a primary policy underlying the proposed Ontario class action procedure, and one that has supported recommendations by this Commission designed to reduce the burdens on individual class members. In view of this express purpose, the approach that is taken to discovery is of particular interest.

Rule 42 of the Rules of the Provincial Court (Civil Division)[83] establishes a general prohibition against discovery, subject to a discretion in the judge to allow it on the application of a party, "if satisfied that the special circumstances of the case make it necessary in the interests of justice". Where the amount claimed is equal to or less than $1,000, however, no discovery at all is permitted.[84] Where discovery is allowed, the judge has a discretion to prescribe how it is to be conducted. If, for example, the judge permits examination of a party, he may order that it be done by written questions and answers, as opposed to the more familiar oral examination for discovery. Like Rule 34 of the small claims court Rules of Procedure,[85] Rule 42 reflects a considered decision that the policy in favour of relatively informal, expeditious proceedings – facilitation of greater access to the courts – outweighs the advantages of permitting discovery as of right.

It is the view of this Commission that an equitable reconciliation of the diverse interests of the court, the defendant, and the class will be achieved if the court considers the propriety of discovery as part of its general discretion to design proceedings for the adjudication of individual issues. Accordingly, our recommendation concerning the design and conduct of individual proceedings contains express reference to the power of the court to dispense with any procedure that it considers unnecessary and to direct special procedures regarding such matters as discovery.[86] Under this power, a court would have a discretion to order discovery of class members by the defendant, as well as discovery of the defendant by class members, where the

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which has a monetary jurisdiction of $3,000. Except as modified by the *Provincial Court (Civil Division) Project Act* and the rules made thereunder, the Provincial Court (Civil Division) is governed by the *Small Claims Courts Act* and its rules and regulations. In fact, the Rules of the Provincial Court (Civil Division) have effected many such modifications.

[82] *Provincial Court (Civil Division) Project Act, supra*, note 81.

[83] R.R.O. 1980, Reg. 806.

[84] *Ibid.*, r. 42(1) provides that, "[e]xcept as provided in this rule, no discovery is permitted". This would exclude the application of r. 33 of the Rules of Procedure of the small claims courts, which allows document discovery on consent of the court, where claims are $1,000 or less. Also, r. 2(2).2 provides expressly that r. 33 of the small claims courts Rules of Procedure does not apply.

[85] *Supra*, note 78.

[86] See Draft Bill, s. 31(2).

circumstances of the case render such discovery necessary for the prosecution or defence of the class members' claims.

(d) Sanctions

The final issue that we wish to consider concerns the sanctions that should be imposed upon absent class members who fail to respond to a request for discovery or examination pursuant to a court order granting the defendant a right of examination or discovery. Because, prior to a determination of the common questions, absent class members are not parties to the action, it is necessary to make express provision for this contingency in the proposed *Class Actions Act.*

The Commission is of the opinion that punitive sanctions should be applied in very limited circumstances. Only where there has been a deliberate, contumacious refusal on the part of class members to respond should their claims be dismissed. It should be noted that this position is consistent with the present law governing discovery of parties, as dismissal of an action is ordered only where there has been wilful disobedience by a party.[87] We are also mindful of the fact that limiting the circumstances in which an absent class member's claim may be dismissed in this way will discourage unnecessary discovery requests, by removing the primary incentive for such requests.[88]

Accordingly, we recommend that where, prior to a determination of the common questions, a court permits discovery or examination of class members, a member who fails to cooperate should be subject to the same sanctions as apply to any party who fails to submit to discovery under the Supreme Court of Ontario Rules of Practice. However, a court should not exclude a class member from recovery unless it determines that no other sanction is adequate to protect the interest of the defendant.[89]

Recommendations

The Commission makes the following recommendations:

1. In order to make it clear that the recommendations set out below

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[87] See *Harwood and Cooper v. Wilkinson* (1929), 64 O.L.R. 658, at 661, [1930] 2 D.L.R. 199 (App. Div.), and Choate, *supra*, note 4, at 143-44.

In the United States, courts generally are loath to dismiss a claim or enter a default judgment in the event of a failure by a party to submit to discovery unless the refusal is "prolonged and blatantly intentional", and then only as a last resort: see Note, "The Emerging Deterrence Orientation in the Imposition of Discovery Sanctions" (1978), 91 Harv. L. Rev. 1033, at 1038-41. If, as this article suggests, this is the present American position, it is anomalous that some courts apparently would apply more onerous standards to absent class members in class actions than to plaintiffs in ordinary civil actions.

[88] See Harvard Developments, *supra*, note 28, at 1446-47, and Party Discovery Techniques, *supra*, note 28, at 1078-79.

[89] See Draft Bill, s. 21(*d*).

governing discovery of absent class members by the defendant prior to the trial of the questions common to the class do not affect discovery as between the representative plaintiff and the defendant, the proposed *Class Actions Act* should provide that the representative plaintiff and the defendant have the same rights of discovery against each other that are available in ordinary actions.

2. On a motion or application in an action brought under the proposed *Class Actions Act*, including a motion for certification of the action as a class action, the defendant should not be able by subpoena to require a member of the class other than the representative plaintiff to attend to be examined for the purpose of using his evidence on the motion or application except by leave of the court; such leave should be granted only following examination of the representative plaintiff.

3. Prior to the trial of the common questions, a defendant should not be able to discover class members other than the representative plaintiff as of right. Rather, he should be required to apply to the court for leave to discover absent class members; such leave should be granted only after he has discovered the representative plaintiff.

4. In deciding whether to grant leave to examine or discover absent class members under Recommendations 2 and 3, the court should be obliged to consider the following non-exhaustive list of factors:

   (a) the stage of the class proceedings and the issues to be determined at that stage;

   (b) whether discovery or examination is necessary for the purposes of the defence on the issues;

   (c) the approximate monetary value of the individual claims, where monetary relief is claimed; and

   (d) whether discovery or examination will result in oppression, undue annoyance, burden, or expense for the members of the class.

5. Where, prior to the determination of the common questions, a court grants leave to discover or examine absent class members, a class member who fails to submit to discovery or examination should be subject to the same sanctions as apply to a party who fails to submit to discovery under the Supreme Court of Ontario Rules of Practice, except that the court should not be able to exclude a class member from recovery unless it determines that no other sanction is adequate to protect the interest of the defendant.

6. Rights of discovery by and of absent class members at the individual issues stage of a class action should be decided by the court as part of its general discretion to design proceedings for the adjudication of individual issues.

CHAPTER 17

COSTS

1. INTRODUCTION

In this chapter, we shall discuss the costs rules that should apply to actions brought under the proposed Ontario *Class Actions Act*. In our view, the question of costs is the single most important issue that this Commission has considered in designing an expanded class action procedure for Ontario. As we shall explain later, the matter of costs will not merely affect the efficacy of class actions, but in fact will determine whether this procedure will be utilized at all.

At the outset, we wish to state our unanimous conclusion that class actions brought under the proposed *Class Actions Act* should be governed by a set of costs rules different from those that now apply in Ontario to individual actions brought in the Supreme Court and the county and district courts. A majority of the Commission favours the institution of the costs regime described later in this chapter, while one Commissioner prefers to leave the entire question of costs to the discretion of the court.

Since we believe that a departure from the ordinary costs rules is necessary, we shall discuss our reasons in considerable detail. We begin by describing the present law of costs, first in general terms, and then in its particular application to class actions, because the unsatisfactory operation of the existing law in the class action context has convinced us to recommend the changes that are incorporated in the proposed *Class Actions Act*.

2. COSTS IN CIVIL PROCEEDINGS IN ONTARIO: THE PRESENT LAW

The expression "costs" refers to the total of lawyers' fees and disbursements incurred in litigation.[1] In Ontario, it is necessary to distinguish between two categories of costs. First, there are costs payable to a successful party by his unsuccessful adversary; these are termed "party and party costs". Secondly, there are costs payable by a client to his own lawyer, which are commonly referred to as "solicitor and client costs" or "solicitor and own client costs".[2] We shall turn our attention first to the payment of party and party costs in individual actions.

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[1] See Orkin, *The Law of Costs* (1968), at 15, and *Formea Chemicals Ltd. v. Polymer Corp.*, [1967] 2 O.R. 424 (T.O., S.C.O.), at 426-27.

[2] There is some confusion over the proper terminology: see Orkin, *supra*, note 1, at 1-4.

(a) Party and Party Costs

(i) The General Rule

In Ontario, the reimbursement of a lawyer's fees and disbursements is governed by section 80 of the *Judicature Act*,[3] which provides that "the court or judge has full power to determine by whom and to what extent the costs shall be paid". Although the language of section 80 appears to confer a very wide discretion on the court,[4] costs usually are awarded to a successful party. Indeed, this Anglo-Canadian practice, that "costs follow the event", has come to be regarded as a general rule governing party and party costs;[5] in the absence of misbehaviour on his part or on the part of his lawyer, a successful party ordinarily is not denied costs or ordered to pay costs. So entrenched is the practice that costs follow the event that we shall refer to it in this chapter simply as "the party and party costs rule" or "the general rule".[6]

This general rule reflects a civil litigation system that affords redress on the basis of a fault principle.[7] Costs are awarded to a successful litigant as compensation for being obliged to prosecute or defend an action. If a plaintiff ultimately obtains relief after an adjudication, he has been forced to incur expenses in the vindication of his claim. To be compensated for his loss, to be made "whole" again, the plaintiff must recover party and party costs. The same principle applies in the case of a successful defendant.

That an award of costs ordinarily depends on the outcome of a suit accounts for the consequential effect of the party and party costs rule as a deterrent to litigation. Because the result of any action is uncertain, a person must evaluate very carefully the prospects of success before deciding whether to commence or defend an action; in the event of failure, he will normally have to pay the costs of his adversary, in addition to his solicitor and client costs. Inevitably, then, the rule that costs follow the event encourages caution and deliberation. Indeed, notwithstanding that the development of the rule was inspired by a compensatory purpose, and not by a desire to discourage spurious litigation, this deterrent aspect has come to be regarded as a second justification for the rule: it is in the public interest that unmeritorious claims

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[3] R.S.O. 1980, c. 223. Section 64 of the revised *Judicature Act*, proposed by the Civil Procedure Revision Committee, is similar: see Province of Ontario, Ministry of the Attorney General, Civil Procedure Revision Committee, untitled report (June 1980), Proposed Revision of The Judicature Act (hereinafter referred to as "Williston Committee Revised Judicature Act").

[4] Moreover, s. 27 of the *Judicature Act* provides that the order of a trial judge respecting costs is not subject to appeal, except by leave of the court or the judge making the order. See, also, Williston Committee Revised Judicature Act, *supra*, note 3, s. 26(2).

[5] See, generally, Gold, "Controlling Procedural Abuses: The Role of Costs and Inherent Judicial Authority" (1977), 9 Ottawa L. Rev. 44; Lantz, "Costs as a Regulatory Device" (1979-81), 2 Advocates' Q. 396; and Orkin, *supra*, note 1, at 16-26.

[6] See, generally, Gale, Marriott, and Hemmerick (eds.), *Holmested and Gale on The Judicature Act of Ontario and Rules of Practice* (1980), Vol. 1, s. 82, §§1-25, at 508-30.

[7] For a discussion of the origins of the party and party costs rule, see Watson and Williams, *Canadian Civil Procedure* (2d ed., 1977), ch. 2, at 2-4, and Goodhart, "Costs" (1929), 38 Yale L.J. 849, at 851-54.

are not pursued and that specious defences are not advanced, so that the courts will be relieved of the burden of processing unnecessary litigation.

While the general rule is well established in our legal system, there are well accepted exceptions that justify a denial of costs to a victorious party, even where there has been no misconduct by him or by his lawyer.[8] In some cases, a successful party may not be awarded costs where the issue determined is novel,[9] where the court has been asked to interpret a new or ambiguous statute,[10] or where the action is a "test case".[11] Where these exceptions apply, each party bears his own costs. The existence of certain exceptions indicates that the general rule is not immutable, but a rule that, however deeply entrenched, occasionally defers to special considerations dictating that its application is inappropriate.

The exceptions to the general rule also may be seen as examples of cases where the unsuccessful litigant has indirectly benefited the public by bringing or defending an action. If the meaning of an ambiguous statute is clarified, or a novel point of law is developed, persons other than the litigant benefit through the additional guidance afforded by the judgment in the action. The "public interest" element inherent in such cases may be the unarticulated reason for relieving the unsuccessful party from payment of party and party costs. If the general rule were to apply without exception, rigidly imposing costs on unsuccessful parties, it is less likely that individuals would initiate or defend actions raising difficult questions, the resolution of which would enure to the advantage of the wider public. Thus, one can view the existence of these exceptions, at least in part, as a judicial structuring of the costs rules to achieve certain policy objectives.

(ii) The Amount of Recoverable Costs

While a successful litigant may expect a party and party costs award to provide an indemnity for the legal costs actually incurred, usually such an indemnity is only partial. To the extent that costs are not indemnified by a party and party costs award, the winning party will be obliged to pay them to his own lawyer. Partial indemnification is an intermediate position between a costs rule that would provide complete indemnification of the successful party and a rule that would not permit any award of costs. As we shall discuss later, the latter is the general rule respecting attorneys' fees in the United States.[12]

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[8] See, generally, Orkin, *supra*, note 1, at 18-26.

[9] *Gracie v. King*, [1943] O.W.N. 356 (Master S.C.O.), at 357; *Anderson v. Busse and Federation Ins. Co. of Canada*, [1964] 2 O.R. 454 (Master S.C.O.), at 456; and *York Condominium Corp. No. 148 v. Singular Investments Ltd.* (1977), 16 O.R. (2d) 31, at 37, 77 D.L.R. (3d) 61 (H.C.J.) (subsequent references are to 16 O.R. (2d)).

[10] *Re McMaster*, [1947] 2 W.W.R. 1032 (Sask. K.B.), at 1039; *Re Scarbim Realty Ltd. and City of Toronto* (1979), 21 O.R. (2d) 558 (H.C.J.), at 569; and *Re Monk and Discipline Committee of the Governing Board of Denture Therapists* (1979), 21 O.R. (2d) 445 (Div. Ct.), at 448.

[11] *Re Bothwell Estate*, [1950] 1 W.W.R. 1041 (B.C.S.C.), at 1044. For a discussion of test cases, see *supra*, ch. 3, sec. 1(c).

[12] See *infra*, this ch., sec. 3(a)(i).

The amount of party and party costs recoverable depends on the scale of costs that is ordered by the court. Unfortunately, it is difficult to discuss this subject with complete assurance, as there is some disagreement whether there are two or three scales of costs.[13] Orkin asserts that there are three scales – a party and party scale, a solicitor and client scale, and a solicitor and his own client scale – a view supported by Mr. Justice Jessup in *Re Solicitors.*[14] Watson and Williams contend that there are only two scales of costs – a party and party scale and a solicitor and client scale[15] – a position for which there is authority as well.[16] For our purposes, it is not necessary to resolve this particular controversy;[17] suffice it to say that there are at least two scales of party and party costs, the application of which will result in different costs awards to a successful party. As a consequence, a court's selection of the scale of costs will determine the degree of indemnification by the losing party and, therefore, whether any fees and disbursements remain to be paid by the winning party to his own lawyer.

The party and party scale of costs is the scale commonly employed in Ontario. A recipient of an award on this scale will receive a partial indemnity for the costs payable by him to his own lawyer. By contrast, party and party costs awarded on a solicitor and client scale are intended to provide the successful party with a full indemnity for his actual legal costs, save "only the costs incurred in respect of services not reasonably necessary to permit him to fully and fairly prosecute or defend the action".[18] Rarely are costs awarded on this scale.[19] While it has been said that costs awarded on a solicitor and client scale generally exceed costs awarded on a party and party scale by one-third to one-half, this is merely a flexible "rule of thumb" that can be departed from where it is reasonable to do so.[20]

Although the trial judge is empowered to decide whether costs should be awarded and the appropriate scale of costs,[21] the task of determining the

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[13] See Orkin, *supra*, note 1, at 4-7.

[14] [1967] 2 O.R. 137 (H.C.J.), at 139-40.

[15] Watson and Williams, *supra*, note 7, ch. 2, at 6-7.

[16] *Singer v. Singer* (1975), 11 O.R. (2d) 234 (T.O., S.C.O.), at 238.

[17] For a discussion, see McBride, "Costs", in *Special Lectures of the Law Society: Recent Developments in the Law (Part II)* (1967) 49, at 49-51, and The Law Society of Upper Canada, Department of Continuing Education, *Costs: Party and Party - Updated* (1977), at 4-5.

[18] *Singer v. Singer, supra*, note 16, at 243, aff'd (1975), 11 O.R. (2d) 775 (H.C.J.), esp. at 776-77.

[19] A court may order costs to be taxed on a solicitor and client scale as a punitive measure against a party who has conducted the action in an improper manner: see, for example, *Union Carbide Canada Ltd. v. Vanderkop* (1976), 1 C.P.C. 114 (Ont. H.C.J.), and *Moreira v. Dasilva* (1977), 5 C.P.C. 73 (Ont. H.C.J.).

[20] *Davies v. Davies*, [1968] 2 O.R. 745 (T.O., S.C.O.), at 747; *Re Solicitors, supra*, note 14, at 148; and *Commodore Investments Ltd. v. Buddell*, [1968] 1 O.R. 418 (T.O., S.C.O.), at 421.

[21] *Judicature Act*, R.S.O. 1980, c. 223, s. 80.

actual amount payable is generally the responsibility of a taxing officer. The judge, however, need not leave the calculation of costs to the taxing officer. Rule 659 of the Supreme Court of Ontario Rules of Practice[22] provides that "[a] judgment or order may direct payment of a sum in gross in lieu of taxed costs". This Rule confers a broad discretion on a judge to fix the amount of costs as he deems appropriate.

Where party and party costs are taxed by the taxing officer, they are governed in part by Rule 683 and the Tariffs annexed to the Rules of Practice, which limit the items that can be taxed and set out prescribed amounts for some items for which costs may be awarded. However, insofar as several of the important items in Tariff A are concerned, the taxing officer is given a discretion by the Tariff to increase the amount that may be allowed. Thus, although the existence of a tariff of fees with stipulated amounts circumscribes the discretion of the taxing officer to a certain extent, he retains considerable latitude in assessing lawyers' fees.

Other Rules govern the taxing officer on the taxation of party and party costs. Rule 674[23] obliges him to disallow the costs of proceedings that were, *inter alia*, "unnecessarily taken" or "incurred through overcaution, negligence, or mistake". Rule 677[24] imposes a duty on the taxing officer to disallow, in whole or in part, the costs of any document or proceeding that is "improper, unnecessary or contains unnecessary matter or is of unnecessary length". In fulfilling the mandate of these Rules, the taxing officer is obliged to evaluate closely the performance of the lawyer.[25]

Finally, it should be noted that party and party costs belong to the client, and not to his lawyer. In most cases, however, the practice is that the lawyer will retain the costs and apply them against the bill to his client.

(b) Solicitor and Client Costs: Payment of His Own Lawyer by a Client

In addition to party and party costs, the law of costs is concerned with the payment by a client of his own lawyer. If a party is successful in an action and recovers party and party costs on a party and party scale from his

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[22] Supreme Court of Ontario Rules of Practice, R.R.O. 1980, Reg. 540 (hereinafter referred to as "Rules of Practice"). See, also, Province of Ontario, Ministry of the Attorney General, Civil Procedure Revision Committee, untitled report (June 1980), Proposed Rules of Civil Procedure, r. 59.01(a) (hereinafter referred to as "Williston Committee Rules").

[23] See, also, Williston Committee Rules, *ibid.*, r. 59.02(1)(b).

[24] See, also, *ibid.*, r. 59.02(1)(g).

[25] Rule 59.02 of the Williston Committee Rules, *ibid.*, sets out criteria that may be considered by a court or judge when making "any order" as to costs or by the taxing officer when taxing costs. If the court or judge leaves the costs to be taxed, directions may be given to taxing officers in respect of any of these factors. In the absence of any direction by the court or judge, the taxing officer nonetheless must "exercise his discretion in respect of any of those matters that may appear to be relevant". It was the view of the Williston Committee that r. 59.02 "in substance follows the present practice": see Williston Committee Rules, *ibid.*, Letter of Transmittal, at 28.

adversary, he nonetheless will be liable to his own lawyer for the difference between the awarded costs and the amount of his lawyer's bill for fees and disbursements. If, on the other hand, a party fails in the suit, he will be faced with a bill from his own lawyer, as well as payment of the party and party costs awarded to his opponent.

The *Solicitors Act*[26] governs the payment of fees and disbursements by a client to his own lawyer. It regulates the contractual arrangements between lawyer and client by prescribing the kinds of agreement that are permissible and those that are prohibited. Moreover, the Act establishes a procedure for judicial approval and review of certain types of permissible arrangement. Finally, the Act prescribes a procedure for the determination of the costs that may be charged to a client.[27]

We shall not describe the detailed statutory procedure for the taxation of a solicitor-client bill,[28] since that procedure is not relevant to our inquiry. For our purposes, it is important to observe that, in the absence of an agreement between a lawyer and his client, a dispute concerning the bill is to be decided by a taxing officer, who has the discretion to determine the appropriate amount.

In taxing a solicitor and client bill, the taxing officer assesses the lawyer's fee on a *quantum meruit* basis.[29] Matters incapable of accurate quantification, such as the importance of the action to the client and the degree of skill demonstrated by the solicitor, must nonetheless be given a monetary value.

Instead of leaving the fee to be fixed by a taxing officer, a lawyer and client may wish to settle this matter by agreement. Under the *Solicitors Act*, a

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[26] R.S.O. 1980, c. 478. See, also, Rules of Practice, *supra*, note 22, r. 675.

[27] See, generally, Ontario Law Reform Commission, *Report on The Solicitors Act* (1973).

[28] *Supra*, note 26, ss. 2-13.

[29] In *Re Solicitors*, [1972] 3 O.R. 433 (T.O., S.C.O.), at 436-37, Taxing Officer McBride explained that the following factors are usually examined:

1. The time expended by the solicitor.
2. The legal complexity of the matters dealt with.
3. The degree of responsibility assumed by the solicitor.
4. The monetary value of the matters in issue.
5. The importance of the matters to the client.
6. The degree of skill and competence demonstrated by the solicitor.
7. The results achieved.
8. The ability of the client to pay.

Taxing Officer McBride was careful to comment that the order of items was not intended to suggest any judgment as to their relative importance. In addition, he commented that the significance and weight given to a factor would vary with the circumstances of a particular case. See, also, *Re Solicitors and Kozaroff* (1981), 21 C.P.C. 3 (T.O., S.C.O.), which suggests another factor, that is, the expectation of the client as to the amount of the fee.

lawyer may make a written contract with his client concerning "the amount and manner of payment for the whole or a part of any past or future services in respect of business done or to be done by him".[30] The term "services" includes "fees, costs, charges and disbursements".[31] Under section 18 of the Act, the agreement may specify payment by a "gross sum" or, in the case of non-contentious business and conveyancing, by "a commission or a percentage"; in addition, it may provide for payment by "salary or otherwise".

There is an advantage to the parties in reaching agreement on various terms so that their future affairs can be conducted with an awareness of their respective obligations. However, the special relationship of the lawyer and client and the nature of the duties owed by the former to the latter dictate that agreements between lawyers and clients be treated differently from those concluded in ordinary commercial relations. Because the lawyer is a fiduciary, occupying a position that enables him to influence the judgment of his client, who may lack the requisite knowledge and experience to protect his own interests, it has been recognized that there is a need for supervision of such agreements.

Where an agreement concerns business done or to be done in a court, other than a small claims court, the lawyer is not entitled to receive payment "until the agreement has been examined and allowed by a taxing officer of a court having power to enforce the agreement".[32] If the taxing officer finds that the agreement is not "fair and reasonable", he may require the opinion of the court,[33] and the court may reject the agreement and "reduce the amount payable under the agreement or order it to be cancelled" and order the services taxed "in the same manner as if the agreement had not been made".[34] Either party to an agreement may apply to the court to review it, and the court may enforce it or set it aside.[35]

Notwithstanding the clear statutory requirement of approval for agreements respecting business in court, it has been generally ignored by the legal profession.[36] Curiously, the requirement of prior approval does not extend to agreements respecting non-contentious business. Nor does the *Solicitors Act* provide expressly for judicial review of such agreements.[37] Yet, in this context, there undoubtedly exists the same danger as in contentious matters that the lawyer will exert improper influence on his client. In its *Report on The Solicitors Act*, the Commission criticized this anomaly, and recommended

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[30] *Solicitors Act*, *supra*, note 26, s. 18(1).

[31] *Ibid.*, s. 17(*b*).

[32] *Ibid.*, s. 19.

[33] *Ibid.*, s. 20.

[34] *Ibid.*, s. 21.

[35] *Ibid.*, ss. 25 and 26. See *Re Solicitor*, [1972] 1 O.R. 694 (H.C.J.), rev'd [1973] 1 O.R. 652 (C.A.), and *Re Desrosiers and Konrad* (1974), 6 O.R. (2d) 300, 52 D.L.R. (3d) 524 (H.C.J.).

[36] Ontario Law Reform Commission, *Report on The Solicitors Act* (1973), at 9 and 50-51.

[37] *Ibid.*, at 9, 50-51, and 57-59.

that agreements concerning non-contentious business should be subject to judicial review as well.[38]

While lawyers and clients are permitted considerable latitude respecting fee agreements, arrangements involving a contingency element are prohibited by section 30 of the *Solicitors Act*,[39] which provides as follows:

> 30. Nothing in sections 18 and 35 gives validity to a purchase by a solicitor of the interest or any part of the interest of his client in any action or other contentious proceeding to be brought or maintained, or gives validity to an agreement by which a solicitor retained or employed to prosecute an action or proceeding stipulates for payment only in the event of success in the action or proceeding, or where the amount to be paid to him is a percentage of the amount or value of the property recovered or preserved or otherwise determinable by such amount or value or dependent upon the result of the action or proceeding.

Section 30 is based on the common law prohibitions against maintenance and champerty. Its preclusive effect, however, appears to be broader than the common law.[40] It is clear that, at common law, an agreement that specifies that the lawyer is to receive a percentage fee from his client only in the event of success would be improper. However, in other jurisdictions, there are statements that, at common law, it is not improper for a lawyer to agree that he will seek his costs out of a damages award,[41] or that he may advance disbursements on the understanding that he will be reimbursed out of the damages if the action is successful, but will not recover them if the action fails.[42] In Ontario, neither type of arrangement is permissible under section 30 of the *Solicitors Act.*

The prohibition against contingent fee agreements is reinforced by *An Act respecting Champerty*,[43] a nineteenth century statute that has yet to be repealed. Section 2 of this short Act both forbids and renders invalid "champertous agreements".

Finally, it should be observed that the Rules of Professional Conduct of The Law Society of Upper Canada enjoin its members to follow the rules respecting contingent fees established by the *Solicitors Act.*[44]

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[38] *Ibid.*, at 51.

[39] See discussion, *infra*, this ch., sec. 5(b)(iv)b.

[40] In Province of Ontario, Ministry of the Attorney General, *Report of the Professional Organizations Committee* (1980), at 210-11, the Committee observed that "the Ontario position is more extreme than that evolved by the common law prohibition against champerty (the taking of remuneration in the form of a portion of the client's recovery) inasmuch as those arrangements by which a solicitor is to receive a non-percentage or block fee only in the event of success are also prohibited by *The Solicitors Act*".

[41] *Sievwright v. Ward* (1935), 54 N.Z.L.R. 43 (S.C.).

[42] *Clyne v. New South Wales Bar Association* (1960), 104 C.L.R. 186 (Aust. H.C.).

[43] R.S.O. 1897, c. 327. This statute appears in R.S.O. 1980, Vol. 9, Appendix A.

[44] The Law Society of Upper Canada, *Professional Conduct Handbook* (1978), r. 10, para. 9.

Despite the ban on contingent fees, we understand that, in Ontario, lawyers and clients do enter into *de facto* contingency arrangements, although these do not constitute formal contingent fee agreements. Apparently some lawyers, particularly in personal injury suits, do accept cases on the understanding that payment will be forthcoming if the action is successful, but will not be sought or will be minimal should the action fail.[45] In addition, it should be observed that, at least to some extent, a contingency factor is involved in the taxing officer's assessment of the fee on a solicitor and client taxation. Among the factors that are weighed in determining the appropriate fee is the result achieved.[46] To the extent that the quantum of fees varies with the significance assigned to this factor, there is an element of contingency or risk for the lawyer who has undertaken the litigation.

(c) Legal Aid

Generally speaking, the purpose of the Ontario *Legal Aid Act*[47] is to ensure that individuals are not denied legal representation in litigation or prevented from securing legal advice due to impecuniosity. Under the Ontario Legal Aid Plan, a person who qualifies for assistance chooses his lawyer from a panel containing the names of those lawyers willing to accept legal aid certificates. From the time of acceptance, the normal solicitor-client relationship exists.[48] When the matter is finally resolved, however, the lawyer submits his bill to the Plan, instead of to his client, and is paid according to the tariffs contained in schedules to the regulations promulgated under the *Legal Aid Act.*

By paying the solicitor and client costs of the person to whom assistance has been granted, the Plan overcomes an economic barrier impeding the assertion of otherwise meritorious claims. Nonetheless, an equally serious disincentive to litigation remains. The normal party and party costs rule that "costs follow the event" applies, so that a recipient of legal aid is liable to pay costs awarded against him in the event of failure. However, the regulations allow an unsuccessful legal aid client to apply to the Plan for payment of such costs. Moreover, if he refuses or fails to apply for payment within a reasonable time, the party to whom costs have been awarded may make application.[49] Yet, notwithstanding these provisions, we have been informed that few applications by either party have been successful.[50]

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[45] See Province of Ontario, Ministry of the Attorney General, *Professional Regulation: A Staff Study of Accountancy, Architecture, Engineering and Law in Ontario prepared for the Professional Organizations Committee* (1979), at 320-21.

[46] See the factors listed in *Re Solicitors, supra*, note 29.

[47] R.S.O. 1980, c. 234.

[48] See Province of Ontario, Ministry of the Attorney General, *Report of The Task Force on Legal Aid, Part I* (1974), at 4 (hereinafter referred to as "Osler Task Force on Legal Aid"), and Ontario Law Reform Commission, *Report on Administration of Ontario Courts, Part III* (1973), at 132.

[49] R.R.O. 1980, Reg. 575, ss. 132-34.

[50] From 1974 to February 1981, there were 47 applications by clients; 10 were refused, 25 were discontinued, 9 were still pending, and 3 were paid in full. Of the 80 applications by adversaries of legally-aided persons, 20 were refused, 44 were discontinued, 10

(d) Costs in Class Actions

In Anglo-Canadian case law, there has been virtually no judicial consideration of the question whether the normal party and party costs rule of individual litigation applies in the circumstances of a class action. In Ontario, the ability to make authoritative statements concerning the costs rules applicable to class actions is constrained by the minimal practical experience with such actions. So few class actions have overcome the initial challenges to their propriety and have proceeded to judgment that the question of costs has arisen very rarely. To the extent that the courts have considered the question at all, they have done so mainly in the context of interlocutory proceedings to determine whether the class action should be permitted to continue. In such proceedings, the general rule that costs follow the event usually has been applied.[51]

There is authority for the proposition that, in Ontario, the party and party costs rule is equally applicable to the trial of class actions.[52] Therefore, a class representative incurs the same risk of liability for party and party costs as he would bear if the suit were brought in the form of an individual action. In the event that the suit is unsuccessful, the representative plaintiff alone is liable for the defendant's party and party costs.[53]

In addition to the liability for party and party costs, the class representative is responsible for the solicitor and client costs payable to his own lawyer, regardless of the outcome of the action. Consequently, if the class action fails, the representative plaintiff will be liable for two sets of costs. Even if the suit succeeds and there is the usual award of party and party costs, the representative plaintiff will still have to pay to his own lawyer the amount that is not indemnified by the defendant.

The extent of the potential liability of a representative plaintiff, whatever the result of the suit, will be affected by the particular nature of class actions, which ordinarily are more complex, lengthy proceedings than individual actions. There will therefore be a commensurate increase in the ancillary expenses and lawyers' fees. This, of course, will augment the financial risk assumed by a representative plaintiff.[54]

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applications were still pending, 4 were paid in full, and 2 applications were granted partial payment. These statistics were provided to the Commission by the Office of the Director, Ontario Legal Aid Plan.

[51] See, for example, *York Condominium Corp. No. 104 v. Halliwell Terrace Ltd.* (1975), 12 O.R. (2d) 46 (H.C.J.), and *Stephenson v. Air Canada* (1979), 26 O.R. (2d) 369, 103 D.L.R. (3d) 148 (H.C.J.). But see *York Condominium Corp. No. 148 v. Singular Investments Ltd., supra*, note 9, at 37, where the Court ordered that costs were not to be awarded to the successful defendant.

[52] *Cobbold v. Time Canada Ltd.* (1980), 28 O.R. (2d) 326, 109 D.L.R. (3d) 611 (H.C.J.) (subsequent references are to 28 O R. (2d)).

[53] See *infra*, note 56 and accompanying text.

[54] See, generally, Williams, "Consumer Class Actions in Canada – Some Proposals for Reform" (1975), 13 Osgoode Hall L.J. 1, at 45 (hereinafter referred to as "Williams Consumer Class Actions").

Another significant characteristic of the present law is that, in a class action, as in an individual action, an award of costs is decided at the termination of the proceedings. Consequently, a representative plaintiff will remain unsure of his ultimate liability for his own legal fees and disbursements, as well as the fees and disbursements of the defendant, until the last moment of the trial.

By contrast, absent class members, who are the beneficiaries of the efforts of the class representative and the class lawyer, get a "free ride"[55] in two respects. First, since absent class members are not parties to the action, they are not potentially liable for the party and party costs of the defendant should the class action fail.[56] Secondly, absent class members are not obliged to contribute to the solicitor and client costs owed by the class representative to the lawyer for the class, unless they have entered into agreements to do so.

Under the existing costs regime in Ontario, there is little or no economic incentive for class members to contribute to the expenses and fees incurred in the class action. If the suit succeeds, and there is a monetary award, they will be able to share in the recovery without having incurred any financial risk whatsoever; if the action fails, class members, or at least those with individually nonrecoverable claims, will be in no worse position than before the action was commenced. Therefore, there will be no reason why a class member will make a financial contribution, other than out of a sense of outrage against the defendant or a concern that the burden of litigation be shared equitably. It is unlikely that a class plaintiff would initiate a class action and incur onerous financial risks, relying solely on the existence of such noble sentiments.

Moreover, only in some cases will it be feasible to arrange cost-sharing contracts between a class representative and class members. Where the class is of a size that allows its members to have some familiarity with each other and an awareness of the suit, it may be possible to instil the cooperative attitude that is a prerequisite to the conclusion of cost-sharing agreements. On the other hand, if the class is large and widely dispersed, it is unlikely that a representative plaintiff will be able to obtain financial support from class

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[55] See, generally, Trebilcock, "Winners and Losers in the Modern Regulatory System – Must the Consumer Always Lose?" (1975), 13 Osgoode Hall L.J. 619, at 624, and Stigler, "Free Riders and Collective Action: An Appendix to Theories of Economic Regulation" (1974), 5 Bell J. 359.

[56] The discretion respecting the costs of an action conferred by s. 80 of the *Judicature Act, supra*, note 3, does not allow a court to award costs against a person who is not a party to the action, except in extraordinary circumstances. In *Rockwell Developments Ltd. v. Newtonbrook Plaza Ltd.*, [1972] 3 O.R. 199, at 207, 27 D.L.R. (3d) 651 (C.A.), Arnup J.A., speaking for the Court, interpreted the words "by whom" in s. 80 to mean "by which of the parties to the proceedings before the court or judge". However, there have been a few judicial pronouncements of questionable authority stating that class members may be liable for costs. In *McAllister v. O'Meara* (1896), 17 P.R. 176, at 179, Chancellor Boyd suggested that class members who contribute to the expenses of the action may be held liable to contribute to the costs "upon a proper application". In two recent Ontario cases, *Beyer v. Absamco Developments Ltd.* (1976), 12 O.R. (2d) 768 (Co. Ct.), at 775, and *Murphy v. Webbwood Mobile Home Estates Ltd.* (1978), 19 O.R. (2d) 300, at 302, 6 C.P.C. 124 (H.C.J.), it was stated that, under r. 75 of the Rules of Practice, *supra*, note 22, one of the prerequisites to the bringing of a class action is that the class members be willing to pay the costs of the action if it fails. In neither of these cases was any authority cited for this proposition.

members, unless the group has some pre-existing administrative structure through which a contributory scheme can be organized. In many cases, class members will be united only by the fact that they have suffered injuries as a consequence of an act or omission of the defendant.

Even if it is possible to conclude cost-sharing arrangements with individual class members, it must be understood that, in negotiating them, a class representative must expend time, money, and effort. Consequently, class plaintiffs may be deterred from assuming the financial risk inherent in attempting to arrange a scheme of cost-spreading among class members.

While, in the absence of enforceable agreements, class members cannot be required to make direct contributions to either party and party costs or solicitor and client costs, a form of indirect "contribution" could possibly be exacted. Where a class action is successful in obtaining monetary relief, the legal costs not paid by an award of party and party costs against the defendant could be deducted from the recovery before the balance is distributed to class members. This, in a sense, would impose on class members a form of equitable cost-sharing. Of course, if the class action sought exclusively non-monetary relief, success would not produce a fund and this alternative would be unavailable.

Deducting the costs of litigation from an award of monetary relief would be a sensible and fair solution to the costs problems described above. However, while this device is well-entrenched in American jurisprudence,[57] the law in Ontario is not entirely clear. In *Shabinsky v. Horwitz*,[58] the class plaintiff recovered a fund on behalf of a class, from which the court ordered the payment of the difference between solicitor and client costs and party and party costs. This case would appear to support the proposition that costs can be deducted from a class recovery to reimburse a successful representative plaintiff. However, some doubts have been expressed concerning the authority of a court to make such an order.[59] Consequently, the state of law does not give a prospective class representative complete assurance that, in a successful action, he can look to a recovery for his costs.

Mention also should be made of Rule 696 of the Rules of Practice, which allows a lawyer to make a summary application to the court for a charging order upon property recovered or preserved "through [his] instrumentality . . . for his costs, charges and expenses" in bringing an action to a successful conclusion. Although, *prima facie*, a lawyer is entitled to a charging order as security for his efforts, the court has a discretion whether to grant it. If, in a successful class action for monetary relief, the court were to grant to the lawyer a charging order against the damages recovered from the defendant, it would afford relief to the representative plaintiff; the class lawyer would not need to seek from the class representative the difference between the amount of his solicitor-client bill and the award of party and party costs.

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[57] See *infra*, this ch., sec. 3(a)(i).

[58] [1973] 1 O.R. 745, 32 D.L.R. (3d) 318 (H.C.J.).

[59] See Williams Consumer Class Actions, *supra*, note 54, at 46, *n.* 143.

Yet, while the policy behind Rule 696 seems to be singularly apposite in the case of a class action producing a monetary recovery, the real objective of the Rule is to benefit the lawyer, and not his client.[60] If, after bringing a class action to a successful end, the class lawyer renders a bill to the class plaintiff, the latter could not insist that his lawyer take his fees out of the recovery.

From the foregoing discussion, it may be seen that the application of the present costs rules to class actions deters individuals from coming forward to be representative plaintiffs and, hence, prevents the initiation of class actions. This is most evident where the claims of the class members, including the putative class plaintiff, are relatively small.[61] A modest claim will not defray the solicitor and client costs payable to the class lawyer after a successful action, let alone justify the risk of bearing party and party costs. But, while the costs rules are unquestionably a deterrent where claims are small, they may also effectively deter class actions even where claims are individually recoverable.[62] A person with an individually recoverable claim is better advised to bring his own action against the defendant, rather than incur the more onerous financial costs of a class action, which can bring him no greater material advantage.

There has been widespread agreement that the operation of the existing Anglo-Canadian costs rules discourages class actions generally. This view has been accepted by the Law Reform Commission of Australia[63] and the Law Reform Committee of South Australia,[64] and is reflected in Canada in the

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[60] For an overview of the case law, see Holmested and Gale, *supra*, note 6, Vol. 23, §§1-23, at 2825-32.

[61] See Williams Consumer Class Actions, *supra*, note 54, at 40-52, and Williams, "Damages Class Action Under the Combines Investigation Act", in Williams and Whybrow, *A Proposal for Class Actions Under Competition Policy Legislation* (1976), at 58-59 (hereinafter referred to as "Williams Combines Class Actions").

[62] See Dewees *et al.*, "An Economic Analysis of Cost and Fee Rules for Class Actions" (1981), 10 J. Legal Studies 156, at 157-58. See, also, Prichard and Trebilcock, "Class Actions and Private Law Enforcement" (1978), 27 U.N.B. L.J. 5, and Dewees *et al.*, "Class Actions as a Regulatory Instrument" (Ontario Economic Council, 1980).

[63] See Law Reform Commission of Australia, Discussion Paper No. 11, *Access to the Courts II: Class Actions* (1978), where Commissioner Debelle stated (at 25):

> 60. *The Problem*: Class actions are complex and expensive litigation, probably beyond the resources of all but the very wealthy, if conducted under present rules. Existing cost rules usually require the unsuccessful party to reimburse a major proportion of the costs of his successful opponent. No matter how altruistic he may be, who could afford to maintain proceedings on behalf of a large number of persons seeking damages from a large corporation or government? Who could risk the potentially enormous liability for costs, if unsuccessful? Who could in fact pay such costs if ordered against him? Unless some alteration is made to the existing costs rules, any introduction of class actions will be little more than an empty gesture.

See, also, Debelle, "Class Actions for Australia: Do They Already Exist?" (1980), 54 Aust. L.J. 508, at 509.

[64] Law Reform Committee of South Australia, *Thirty-sixth Report Relating to Class Actions* (1977) (hereinafter referred to as "South Australia Report"). The recommended costs provisions, which, *inter alia*, would replace the party and party costs rule, were justified as follows (at 7-8):

proposed federal competition legislation, Bill C-42 and Bill C-13.[65] There has been a general recognition that, in reforming a class action procedure, whatever its ultimate design, the costs burdens and, particularly, the risk of paying party and party costs, must be reduced or removed from the class plaintiff. However, the range of cost-shifting recommendations presented in academic commentary, studies, and proposed statutes and rules indicates the absence of a consensus on the most appropriate solution.

None of the Australian or Canadian commentators has discussed the possibility of allowing the courts to develop a costs regime to govern class actions. Perhaps this reflects a belief that courts are unlikely to depart from the traditional costs rules, unless convinced that there are sound policy reasons to do so. Nevertheless, under existing law, a court, in the exercise of its discretion, may relieve the costs burden of the representative plaintiff in a particular suit.

In the recent case of *Cobbold v. Time Canada Ltd.*,[66] the Court, after trial, dismissed a class action brought on behalf of the subscribers of *Time* magazine. In making submissions concerning why costs should not be awarded against him, the plaintiff argued, *inter alia*, that he had "brought a significant piece of litigation properly as a class action, which from the point of view of the administration of justice, was in the best interest of everyone that it be tried".[67] The plaintiff's submissions were rejected. Yet the Court did not absolutely foreclose the possibility that costs could be denied to a successful defendant in a class action. While the Court did acknowledge that factual circumstances might arise that would justify granting a class plaintiff an immunity from party and party costs, it did not attempt to delineate the factors relevant to such a determination.

No doubt one should be cautious in drawing general conclusions from a single decision. Nevertheless, we believe that it would be unwise to rely upon the courts to adjust the costs rules in class actions. Even if it could be assumed that some Ontario courts would relieve an unsuccessful class plaintiff from paying party and party costs in a particular class action, this would be a discretionary, *ex post facto* decision; the deterrent effect of the ordinary costs rules would continue to operate, as potential representative plaintiffs would remain unsure whether they would be similarly relieved of costs.

> The cost provisions are radical and have been the subject of careful consideration by the committee. We are convinced that they are necessary if class actions are to be an effective means of redress. A representative plaintiff suing on behalf of a class of persons who seek damages for breach of warranty by the vendor of a mass distributed article or on behalf of nearby residents who sue for damages for nuisance arising out of air pollution emanating from a factory, cannot be expected to expose himself to the risk of costs being awarded against him if the action fails. Unless he is relieved of that risk, class actions in the areas which are of interest to the general public will be rare.

[65] *An Act to Amend the Combines Investigation Act*, Bill C-42, 1977 (30th Parl. 2d Sess.) (hereinafter referred to as "Bill C-42"), and *An Act to Amend the Combines Investigation Act*, Bill C-13, 1977 (30th Parl. 3d Sess.) (hereinafter referred to as "Bill C-13").

[66] *Supra*, note 52.

[67] *Ibid.*, at 347.

It may be argued that the availability of legal aid provides an effective answer to this problem. Until 1977, however, the administrators of the Ontario Legal Aid Plan took the position that, under the *Legal Aid Act*, legal aid was not available for class actions.[68] In October 1977, the Legal Aid Committee instituted a change of policy. It established a Sub-Committee of the Legal Aid Committee to review any application for a legal aid certificate that might reasonably be considered a group application, an application on behalf of a class, or an application in respect of a test case. It was thought that, by reviewing actual applications, the Sub-Committee eventually would be able to develop a set of guidelines for handling future applications for legal aid and, if necessary, formulate concrete proposals for amendments to the relevant legislation. We have been informed that criteria have not yet been developed and that applications will continue to be considered on a case-by-case basis.

In our view, the possibility that legal aid may be available is not a solution to the problems faced by a potential representative plaintiff. Even if a representative plaintiff were to receive legal aid, he alone would remain personally liable for paying party and party costs if the action failed. Moreover, the principle upon which legal aid is granted in individual actions – the impecuniosity of the plaintiff – does not address the economic problem faced by a prospective plaintiff in the class action context. His dilemma is not necessarily a lack of financial resources, but rather the fact that the potentially enormous costs of litigation so exceed the amount of his personal stake that, regardless of his resources, it would not be economically rational to initiate a class action.

In connection with the financial dilemma faced by a prospective class plaintiff, we find it interesting that the existing costs rules have been altered by the Legislature in their application to shareholders' representative actions brought under section 97 of the *Business Corporations Act*.[69] The position of a shareholder who wishes to maintain a representative action is similar to that of a prospective class representative, in that he may possess only a small

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[68] For a discussion of the policy until 1974, see Osler Task Force on Legal Aid, *supra*, note 48, at 95-102.

Section 12 of the *Legal Aid Act*, R.S.O. 1980, c. 234, provides for the mandatory issuance of certificates to financially eligible persons in proceedings in a range of courts. "Person" is defined to be an "individual". It has been suggested that this definition excludes applications by groups and forecloses the possibility of publicly funded class actions through the Plan.

The entitlement of groups and their representatives to legal aid certificates is confused further by s. 39 of the regulations to the Act: see R.R.O. 1980, Reg. 575. Section 41(*a*)(iv) purports to refuse a certificate to a person if "the relief sought can bring no benefit to the applicant over and above the benefit that would accrue to him as a member of the public or some part thereof". Yet s. 41(*b*)(i) and (ii) confers a discretion to grant a certificate where "the applicant is one of a number of persons having the same interests under such circumstances that one or more may sue or defend on behalf of or for the benefit of all" or where "the applicant has the right to be joined in one action as plaintiff with one or more other persons having the same right to relief by reason of there being a common question of law or fact to be determined". Thus, there appears to be a conflict in the provisions of the regulations.

[69] R.S.O. 1980, c. 54.

economic interest in an action that will benefit others – in the case of a shareholder, the corporation and his fellow shareholders. If the normal costs rules were to apply without modification, it is unlikely that a shareholder would initiate such a suit, as the cost of retaining a lawyer and the potential liability for party and party costs often would exceed the amount of his own stake.[70] Consequently, when the Legislative Assembly of Ontario enacted the predecessor to section 97, it included special costs provisions that recognized the very different position of the prospective shareholder litigant.[71] The policy of instituting special costs rules in derivative suits has been continued in the proposed *Business Corporations Act, 1981*.[72] The fact that the Legislature has chosen to enact special costs provisions in this kind of representative action is significant, because both actions under section 97 and class suits are types of litigation that benefit persons other than the plaintiff, who may have a personal economic interest that is dwarfed by the potential costs.

Finally, we wish to mention the decision of the English Court of Appeal in *Wallersteiner v. Moir (No. 2)*.[73] In a common law derivative action, the Court was of the view that, because the application of the normal costs rules would deter a minority shareholder from bringing suit, a special rule was warranted. The Court held that, in such circumstances, the shareholder plaintiff should have a right to be indemnified by the corporation. By providing for the indemnification of the plaintiff shareholder by the corporation, the English Court of Appeal was implementing a principle that the potential beneficiary of an action should pay for its expense.

(e) Conclusions

Earlier in this Report, we recommended that Rule 75 should be replaced by an expanded class action procedure. The decision to recommend such a procedure evinces our endorsement of the three main benefits of such actions, that is, judicial economy, access to justice, and behaviour modification.[74]

In our deliberations respecting an Ontario class action procedure, we

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[70] The deterrent effect of the normal costs rules is discussed in Gower, *The Principles of Modern Company Law* (4th ed., 1979), at 651-52.

[71] *The Business Corporations Act, 1970*, S.O. 1970, c. 25, s. 99. See, now, R.S.O. 1980, c. 54, s. 97(3), (4), and (5). Section 97(3) provides that the court cannot make an order that the plaintiff shareholder give security for costs. Section 97(4) allows the plaintiff to apply to the court for an order that the corporation, the nominal defendant, pay "reasonable interim costs, including solicitor's and counsel fees and disbursements". However, if the action is dismissed with costs, he is liable to the corporation for these costs. Section 97(5) gives the court trying the action power to order that the corporation or other defendants pay the reasonable costs of the action "taxed as between a solicitor and his own client", except where the action is dismissed with costs.

[72] Bill 6, 1981 (32d Leg. 1st Sess.), s. 246(*d*) and s. 245(4). Section 246(*d*) of the Bill, in contrast to s. 97(5) of the *Business Corporations Act*, empowers the court to order that the corporation pay "reasonable legal fees and any other costs reasonably incurred by the complainant in connection with the action", even where the action fails. Under s. 248(3) of the Bill, security for costs cannot be ordered against a plaintiff.

[73] [1975] Q.B. 373, [1975] 1 All E.R. 849 (C.A.) (subsequent references are to [1975] Q.B.).

[74] *Supra*, ch. 4, sec. 3(a).

gave careful consideration to the arguments against class actions, but generally found them flawed or not supported by the available empirical evidence.[75] To the extent, however, that class actions may create certain problems, the Commission concluded that they should be addressed by specific safeguards, which have been incorporated in the *Class Actions Act.*

The most important concern of the Commission has been that only appropriate class actions should be allowed to proceed. This concern is reflected in our fundamental recommendation that an action should be allowed to proceed as a class action only after it has received judicial approval, upon satisfaction of a number of certification tests. These tests are intended to act as a filter, allowing only proper, meritorious class actions to be brought in Ontario. This purpose is particularly evident in the incorporation of a preliminary test on the merits and a "cost-benefit" test,[76] the latter of which permits the court to refuse to certify a class action if it is of the view that the adverse effects of the proceedings would outweigh its benefits. In light of the purpose of the certification tests – to weed out inappropriate class actions – we believe that it is neither necessary nor appropriate for the costs rules to be assigned a similar function. It should be emphasized that the existing costs rules have the effect of discouraging all class actions, for reasons having nothing to do with their propriety or merits.

We believe that the application of the existing costs rules to class actions initiated under our expanded class action procedure would continue to discourage the initiation of such actions. Under these rules, a representative plaintiff is financially responsible to his own lawyer, whose efforts may benefit the entire class and, in addition, the representative plaintiff must bear the sole responsibility for the party and party costs of a successful defendant. Even if the action succeeds, he remains personally liable for that portion of his lawyer's fee not recovered by an award of party and party costs against the defendant. If the anticipated gain of the class plaintiff does not exceed the costs for which he may be personally liable, there is little hope that a rational person will choose to be a representative plaintiff. In our view, to make the use of the class action procedure depend on the presence of such selfless zeal would cause it to be neglected. Furthermore, it bears emphasizing that, even where claims are substantial and individually recoverable, under the existing costs regime a rational person would prefer to proceed in an individual suit, which would be less costly, instead of a class action.

It is therefore the view of the Commission that, if the expanded class action procedure is to be utilized at all, the present costs rules cannot continue to apply. Accordingly, we recommend that actions brought under the proposed *Class Actions Act* should not be governed by the costs rules that govern individual actions brought in the Supreme Court of Ontario and the county and district courts. With respect to the question of what rules should replace the existing regime, we have examined closely the costs regime governing class actions in the United States and Quebec, and proposals for reform in the United States, Australia, and Canada. We turn first to discuss the American experience.

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[75] *Ibid.*, sec. 3.

[76] See *supra*, chs. 7 and 9, respectively.

3. ATTORNEYS' FEES, COSTS, AND EXPENSES IN CLASS ACTIONS IN THE UNITED STATES

In the United States, as in Ontario, class actions are subject to the same costs rules that govern individual actions. These rules, however, are fundamentally different than the Ontario costs rules that we have described, and their application in the class action context has facilitated, rather than discouraged, the initiation of class actions. What distinguishes the American rules is that they effectively remove the financial burdens from the representative plaintiff. Yet, as we shall explain later, while the class representative in the United States is in a more favourable position than his counterpart in Ontario, he is not completely immune from financial risk.

In this section, we shall describe the operation of the costs rules in class actions in the United States. Since this is a vast subject, encompassing numerous discrete issues and involving hundreds of cases, we cannot attempt an exhaustive analysis. Accordingly, the discussion will be confined to five matters necessary to a basic understanding of the issue. First, we shall discuss the bases for an award of fees and disbursements to lawyers in class actions. Secondly, we shall explain how attorneys' fees are calculated. Thirdly, we shall outline briefly the procedure to be followed in fee assessment. Fourthly, we shall examine allegations that there is a conflict between the interests of the lawyer and the class. Finally, we shall consider the charge that class lawyers have been able to obtain excessive fees for their services.

Before we begin, however, it is necessary to explain the meaning of certain terms that will be employed throughout the discussion.[77] While, in Ontario, the term "costs" refers to both lawyers' fees and disbursements,[78] in the United States, it denotes only expenses incurred by a party that are reimbursed as "taxable costs" by his adversary. These taxable costs are less than "expenses", which are the total amount of expenditures made by a party in the course of the action.[79] Where reference is made to the remuneration of a lawyer for his services, the expression "attorneys' fees" is employed. The meaning of this term is restricted to the fees payable to the lawyer, and does not include court costs or other ancillary litigation expenses, such as discovery costs or witness fees. In the United States, attorneys' fees, on the one hand, and costs and expenses, on the other, are governed by different rules. The distinction is particularly significant in class action litigation, because it has been argued that certain aspects of the rules affecting expenses and costs pose economic disincentives to the initiation of actions.[80] We shall turn our attention first to attorneys' fees.

(a) Attorneys' Fees

(i) Bases for Fee Awards in Class Actions

In the United States, civil litigation is subject to the general rule that "the

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[77] For a discussion of the meaning of "costs", "expenses", and "fees", see Wright and Miller, *Federal Practice and Procedure* (1972), Vol. 10, §2666, at 126.

[78] *Supra*, note 1 and accompanying text.

[79] See, generally, Wright and Miller, *supra*, note 77, Vol. 10, §§2665-79, at 122-243.

[80] See *infra*, this ch., sec. 3(b).

prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser".[81] This denial of fees is popularly known as the "American rule". In precluding reimbursement of victorious litigants, the American rule distinguishes the United States from most legal systems.[82] Although various theories have been suggested to account for the development of this rule, its origins remain uncertain and controversial.[83] There is a consensus, however, as to the major underlying policy justification for the rule. It is said that the rule is intended to facilitate access to the legal system, on the assumption that the possibility of being required to pay the attorneys' fees of a successful adversary will deter persons, and particularly impecunious persons, from commencing actions.[84]

Under the American rule, each party in theory is responsible for paying the fees of his or her own lawyer, regardless of the outcome of the action. In practice, this burden may be removed from litigants in both individual litigation and class actions. In individual actions for damages, the widespread practice of arranging for the lawyer to be paid according to a contingent fee agreement,[85] virtually ubiquitous in personal injury

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[81] *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, at 247, 95 S. Ct. 1612 (1975) (subsequent references are to 421 U.S.). The United States Supreme Court also has expressed the rule to be that every litigant is to bear his own attorney's fees: see *The Boeing Company v. Van Gemert*, 444 U.S. 472, 100 S. Ct. 745, at 749 (1980) (subsequent references are to 100 S. Ct.).

[82] See Cappelletti and Garth, "Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective" (1978), 27 Buffalo L. Rev. 181, at 187, *n.* 12.

[83] See, generally, Goodhart, *supra*, note 7, at 872-74; Note, "Attorney's Fees: Where Shall the Ultimate Burden Lie?" (1967), 20 Vand. L. Rev. 1216, at 1219-21; and Newberg, *Newberg on Class Actions* (1977), Vol. 3, §7230a, at 1678-79.

[84] In *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 87 S. Ct. 1404 (1967), Chief Justice Warren observed (at 718) that, "[i]n support of the American rule, it has been argued that since litigation is at best uncertain one should not be penalized for merely defending or prosecuting a lawsuit, and that the poor might be unjustly discouraged from instituting actions to vindicate their rights if the penalty for losing included the fees of their opponents' counsel".

That in fact the American rule produces this salutary effect has, however, been doubted. Some critics have suggested that it would be preferable to adopt the Anglo-Canadian party and party costs rule in order to make "whole" the wronged litigant, thereby allowing the institution of meritorious suits by persons encouraged by the possible reimbursement of attorneys' fees: see, for example, Newberg, *supra*, note 83, Vol. 3, §7230b, at 1679-82; Stoebuck, "Counsel Fees Included in Costs: A Logical Development" (1966), 38 Colum. L. Rev. 202; Ehrenzweig, "Reimbursement of Counsel Fees and the Great Society" (1966), 54 Calif. L. Rev. 792; Kuenzel, "The Attorney's Fee: Why Not a Cost of Litigation?" (1963), 49 Iowa L. Rev. 75; McCormick, "Counsel Fees and Other Expenses of Litigation as an Element of Damages" (1931), 15 Minn. L. Rev. 619; and McLaughlin, "The Recovery of Attorney's Fees: A New Method of Financing Legal Services" (1972), 40 Fordham L. Rev. 761.

[85] The term "contingent fee" has been defined as follows in MacKinnon, *Contingent Fees for Legal Services* (1964), at 3:

> A contingent fee can be defined as a fee received for services performed on behalf of a client who is asserting a claim, payable to a lawyer if, and only if, some recovery is achieved through the lawyer's efforts. Its distinguishing characteristic is the negative: if no recovery is obtained for his client, the lawyer is not entitled to a fee.

There are different kinds of contingent fee agreement, which vary according to the

litigation,[86] will free the plaintiff from the obligation to compensate his lawyer where the action is unsuccessful. Where the suit is successful, the lawyer will obtain his fee out of the recovery, according to the terms of the agreement.

Reliance on such agreements is only practicable where a plaintiff possesses a substantial claim for monetary relief. In two situations, the usual form of contingent fee agreement with a plaintiff will normally be of no avail. If an action seeks injunctive or declaratory relief, whether in class or individual form, success will not produce a fund from which attorneys' fees can be deducted. In addition, in class actions for monetary relief, a percentage or other type of traditional contingent fee agreement with the class representative would bind only his monetary award, but would not affect the awards of other class members.[87] Hence, if other means of shifting the responsibility for paying his own lawyer were not available in class litigation, the operation of the American rule would oblige a prospective plaintiff to shoulder a financial burden that, due to the length and complexity of a class action, would be particularly onerous in relation to the size of his claim. Indeed, this would deter persons from commencing class actions, irrespective of their merit.

In the United States, however, traditional contingent fee agreements do not constitute the only means by which a plaintiff may be relieved of the burden of paying attorneys' fees. This disincentive to the initiation of litigation may be removed by the operation of so-called "exceptions"[88] to the American rule, which have the effect of shifting this burden elsewhere.[89] These exceptions, although not specifically devised for class actions, do apply to them, and are singularly important in this context, as they constitute the bases upon which attorneys' fees are awarded. Moreover, as we shall explain later in this section, entitlement to attorneys' fees under these exceptions is dependent upon success in the action.

The exceptions to the American rule arise from two sources. First,

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method by which the fee is calculated. The most familiar kind provides that the lawyer is to receive a stipulated percentage of a recovery in the event of success. Another type of agreement provides for the application of a declining percentage scale in which decreasingly smaller percentages are applied to successive amounts over specified thresholds. Still another kind stipulates for different percentage fees that vary according to the stage of the proceedings at which the determination of the client's recovery is made: see MacKinnon, *ibid.*, at 183-88.

[86] See Schwartz and Mitchell, "An Economic Analysis of the Contingent Fee in Personal-Injury Litigation" (1970), 22 Stan. L. Rev. 1125, and Clermont and Currivan, "Improving on the Contingent Fee" (1978), 63 Cornell L. Rev. 529, at 531, *n.* 2.

[87] See Dawson, "Lawyers and Involuntary Clients: Attorney Fees from Funds" (1975), 87 Harv. L. Rev. 1597, at 1608 (hereinafter referred to as "Dawson I"), and Dawson, "Lawyers and Involuntary Clients in Public Interest Litigation" (1975), 88 Harv. L. Rev. 849, at 923 (hereinafter referred to as "Dawson II").

[88] Whether the particular means by which attorneys' fees are to be shifted constitute, strictly speaking, an "exception" to the American rule depends on how the rule is characterized: see *supra*, note 81 and accompanying text.

[89] See, generally, Wright and Miller, *supra*, note 77, Vol. 10, §2675, at 179-99, and Note, "Attorney Fees: Exceptions to the American Rule" (1976), 25 Drake L. Rev. 717.

numerous exceptions have been enacted by federal statutes. Secondly, exceptions have been fashioned by the courts in the exercise of their inherent equitable jurisdiction.[90] Since the reasons for the creation of the statutory and judicial exceptions differ, we shall discuss them separately.

In numerous federal statutes,[91] Congress has enacted provisions that stipulate for the payment of "reasonable attorneys' fees", either to a successful plaintiff alone, or to the "prevailing party", from his unsuccessful adversary. Certain provisions are mandatory, requiring fees to be awarded to the successful party upon conclusion of the action. Other provisions give the court a discretion to grant fees.

While it is difficult to make general statements about the object of discretionary fee provisions,[92] the purpose of those that provide for a mandatory award of attorneys' fees to successful plaintiffs is clear. They are intended to encourage individuals to commence civil actions as a means of private law enforcement. Since the statutes containing mandatory fee-shifting provisions rely on private actions to supplement government enforcement of regulatory legislation, it was necessary to impart the requisite incentives by providing for the reimbursement of attorneys' fees.[93] It was thought that, if the American rule were to apply without modification, the prospect of paying their own lawyers would deter persons from initiating such litigation.

Consistent with this policy, the United States Supreme Court has taken the position that, in considering fee provisions conferring a discretion to award fees to a "prevailing party", successful plaintiffs should be judged by a less stringent standard than successful defendants. The Supreme Court has stated that, while courts should ordinarily order that fees be granted to plaintiffs, unless special circumstances render an award unjust,[94] they may exercise their discretion in favour of successful defendants only if the suit of the plaintiff was "frivolous, unreasonable, or without foundation".[95]

Statutes that provide for an award of fees only to successful plaintiffs

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[90] See Newberg, *supra*, note 83, Vol. 3, §7240a, at 1687-88.

[91] In 1977, a commentator observed that there were 75 statutory fee provisions: see Berger, "Court Awarded Attorneys' Fees: What is 'Reasonable'?" (1977), 126 U. Pa. L. Rev. 281, at 303. Fee-shifting provisions are listed in *Alyeska Pipeline Service Co. v. Wilderness Society*, *supra*, note 81, at 260-61, *n.* 33, and Newberg, *supra*, note 83, Vol. 3, §7040, at 1364-63.

[92] The difficulty arises because discretionary fee provisions are of different kinds. Some make an award of fees depend on a finding that a party has been litigating in bad faith or that a violation of the statute was "wilful" or "knowing". Still others simply authorize the court to award fees in its discretion, without setting out conditions for its exercise: see Newberg, *supra*, note 83, Vol. 3, §7240, at 1684-86.

[93] See, generally, Newberg, *supra*, note 83, Vol. 3, §7240, at 1684-85; Mowrey, "Attorney Fees in Securities Class Actions and Derivative Suits" (1978), 3 J. Corp. L. 267, at 270; and Comment, "The Allocation of Attorney's Fees after *Mills v. Electric Auto-Lite Co.*" (1971), 38 U. Chi. L. Rev. 316, at 318-19.

[94] *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, at 402, 88 S. Ct. 964 (1967).

[95] *Christiansburg Garment Co. v. Equal Employment Opportunity Commission*, 434 U.S. 412, at 421-22, 98 S. Ct. 694 (1978).

implement what is known as a "one way" rule. In other words, a combination of the normal American rule, denying fees to successful parties from their adversaries – a "no way" rule – and the relevant statutory provision, means that attorneys' fees can be awarded only in one direction, that is, from a losing defendant to a victorious plaintiff. By contrast, the Anglo-Canadian costs rule, which provides that costs generally are to be awarded to a successful party, is a "two way" rule.

As we have indicated, in addition to statutory exceptions, the courts have engrafted exceptions to the American rule in the exercise of their inherent jurisdiction. The first category is the "bad faith" exception, under which a court may order an unsuccessful litigant to pay attorneys' fees as a punitive measure, in response to abusive behaviour in the conduct of the litigation or the maintenance of a clearly spurious claim or defence.[96] This exception, however, has been relatively unimportant as a means of alleviating the financial burden of class representatives. Moreover, since the bad faith exception operates only after the litigation is concluded, a person cannot rely on it when considering whether to commence a class action.

Of crucial significance, by contrast, are two judicial exceptions that have been termed the "common fund doctrine" and the "substantial benefit doctrine".[97] The common fund doctrine, and its derivative, the substantial benefit doctrine, relieve the plaintiff from paying attorneys' fees by allocating such fees among persons who have benefited from the action. In spreading the burden, these exceptions differ from the statutory fee provisions and the bad faith exception, both of which shift the burden of paying fees to the unsuccessful defendant.[98]

The common fund and substantial benefit doctrines were developed by the United States Supreme Court in a series of decisions that began in the nineteenth century.[99] Under the common fund doctrine, a lawyer whose conduct of an action results in the creation, preservation, or increase of a fund in which others have an interest is entitled to receive fees from the fund as compensation for his services on their behalf, in addition to any fees to which he may be entitled from his own client.[100] This equitable doctrine, purporting

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[96] *Hall v. Cole*, 412 U.S. 1, at 5, 93 S. Ct. 1943 (1972) (subsequent references are to 412 U.S.). See, generally, Newberg, *supra*, note 83, Vol. 3, §§7240b-d, at 1688-92; Mowrey, *supra*, note 93, at 272-74; and Note, *supra*, note 89, at 726-29.

[97] See, generally, Mowrey, *supra*, note 93, at 276-81. The substantial benefit doctrine has also been referred to as the "common benefit doctrine": see, for example, Dawson II, *supra*, note 87, at 896 *et seq.*, and Berger, *supra*, note 91, at 295-303.

[98] See Newberg, *supra*, note 83, Vol. 3, §7245, at 1692.

[99] *Trustees v. Greenough*, 105 U.S. 527 (1881); *Central Railroad & Banking Co. v. Pettus*, 113 U.S. 116 (1885); *Harrison v. Perea*, 168 U.S. 311 (1897); *United States v. Equitable Trust Co.*, 283 U.S. 738, 51 S. Ct. 639 (1931); *Sprague v. Ticonic National Bank*, 307 U.S. 161, 59 S. Ct. 777 (1939); *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 90 S. Ct. 616 (1970) (subsequent references are to 396 U.S.); *Alyeska Pipeline Service Co. v. Wilderness Society*, *supra*, note 81; and *The Boeing Company v. Van Gemert*, *supra*, note 81.

[100] Under the common fund doctrine and the substantial benefit doctrine, a plaintiff whose action has resulted in the creation, preservation, or increase of a fund or the creation of

to apply restitutionary principles, is based on the view that, unless the beneficiaries of the litigation are required to contribute to the expense of its prosecution by means of a deduction of attorneys' fees from the fund, they will be unjustly enriched.[101]

The unjust enrichment principle underlying the common fund doctrine has been extended to cases where the litigation has conferred a non-pecuniary benefit on persons other than the plaintiff, provided that the court has found that the benefit was sufficiently important.[102] Hence, the substantial benefit doctrine is applicable where there is no fund against which lawyers' fees can be assessed, nor any benefit capable of conversion into monetary terms. The application of this doctrine apparently has been restricted to shareholders' derivative actions and actions brought against unions on behalf of their membership. In such cases, the beneficiaries of the litigation are considered to be the shareholders and union members, respectively. Because the benefit is non-pecuniary, it has been necessary to rely on the interposition of an entity to bear the costs burden directly on behalf of the actual beneficiaries among whom, in theory, it should be allocated. Accordingly, in order to apportion the burden of attorneys' fees, courts have made an award of fees against the corporation[103] and the union.[104]

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a substantial benefit has a right to be reimbursed for the expense of bringing his action, including his attorneys' fees. Apparently, it is rare that applications for attorneys' fees be made by clients: see Dawson I, *supra*, note 87, at 1606-08, and Dawson II, *supra*, note 87, at 852. For a discussion of the two possible "causes of action" for attorneys' fees under the common fund doctrine, see *Lindy Brothers Builders, Inc. v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161 (3d Cir. 1973), at 165-66.

[101] In *The Boeing Company v. Van Gemert*, *supra*, note 81, at 749, Powell J., who delivered the decision of the Court (Rehnquist J. dissenting), explained that "[t]he doctrine rests on the perception that persons who obtain the benefit of a lawsuit without contributing to its cost are unjustly enriched at the successful litigant's expense . . . . Jurisdiction over the fund involved in the litigation allows a court to prevent this inequity by assessing attorney's fees against the entire fund, thus spreading fees proportionately among those benefited by the suit." In two articles, Dawson has presented a detailed criticism of the use of restitutionary principles to award fees to lawyers: see Dawson I, *supra*, note 87, and Dawson II, *supra*, note 87.

[102] *Sprague v. Ticonic National Bank*, *supra*, note 99, and *Mills v. Electric Auto-Lite Co.*, *supra*, note 99. See, generally, Newberg, *supra*, note 83, Vol. 3, §§7245-7245d, at 1692-1708; Dawson II, *supra*, note 87, at 863-70; and Note, "Reimbursement for Attorneys' Fees From the Beneficiaries of Representative Litigation" (1974), 58 Minn. L. Rev. 933. In *Mills*, the Supreme Court was influenced by a series of articles by George Hornstein, in which he argued that incentives were needed to encourage private enforcement of legislation: see Hornstein, "The Counsel Fee in Stockholder's Derivative Suits" (1930), 39 Colum. L. Rev. 784; Hornstein, "New Aspects of Stockholders' Derivative Suits" (1947), 47 Colum. L. Rev. 1; and Hornstein, "Legal Therapeutics: The 'Salvage' Factor in Counsel Fee Awards" (1956), 69 Harv. L. Rev. 658. See, also, Comment, *supra*, note 93, at 326-27.

[103] In *Mills v. Electric Auto-Lite Co.*, *supra*, note 99, at 395, the Court explained that its "jurisdiction over the corporation as nominal defendant made it possible to assess fees against all of the shareholders through an award against the corporation".

[104] In *Hall v. Cole*, *supra*, note 96, at 8-9, an action was brought by a union member against the union under §102 of the Labor-Management Reporting and Disclosure Act ("LMRDA") after he was expelled by the union for exercising his rights as a union member. The United States Supreme Court stated (footnotes omitted):

Until 1975, some courts ordered unsuccessful defendants to pay attorneys' fees pursuant to a judicial exception to the American rule known as the "private attorney general doctrine".[105] Under this doctrine, fees were granted if, in the opinion of the court, the action vindicated an important statutory policy. As fees were awarded against unsuccessful defendants, this doctrine resembled the cost-shifting statutory exceptions, rather than the common fund and substantial benefit doctrines, which are cost-spreading mechanisms.

The rationale supporting the birth and development of the private attorney general doctrine was that the prospect of an award of fees was necessary to encourage private suits that sought the enforcement of Congressional policy.[106] However, in *Alyeska Pipeline Service Co. v. Wilderness Society*,[107] a majority of the United States Supreme Court rejected this doctrine, and held that it was the province of Congress, and not of the judiciary, to fashion exceptions to the American rule that, in the absence of specific statutory authorization, attorneys' fees are not recoverable by a prevailing party from his adversary. The Court was of the view that the task of determining which kinds of litigation should be facilitated through the structuring of attorneys' fees rules involved a difficult balancing of policies more appropriately assigned to Congress.

Since its practical effect would be to impose the burden of attorneys' fees upon plaintiffs, the *Alyeska* decision was criticized by commentators who contended that persons would be discouraged from commencing meritorious public interest litigation.[108] This danger, it was argued, would be particularly acute in cases where injunctive relief was sought because, irrespective of the

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> Viewed in this context, there can be no doubt that, by vindicating his own right of free speech guaranteed by §101(a)(2) of Title I of the LMRDA, respondent necessarily rendered a substantial service to his union as an institution and to all of its members. When a union member is disciplined for the exercise of any of the rights protected by Title I, the rights of all members of the union are threatened. And, by vindicating his own right, the successful litigant dispels the 'chill' cast upon the rights of others. Indeed, to the extent that such lawsuits contribute to the preservation of union democracy, they frequently prove beneficial 'not only in the immediate impact of the results achieved but in their implications for the future conduct of the union's affairs.' Thus, as in *Mills*, reimbursement of respondent's attorneys' fees out of the union treasury simply shifts the costs of litigation to 'the class that has benefited from them and that would have had to pay them had it brought the suit'.

[105] See, generally, Dawson II, *supra*, note 87, at 888-907; Mowrey, *supra*, note 93, at 274-76; and Newberg, *supra*, note 83, Vol. 3, §7255, at 1710-17. Articles that discuss the nature of the private attorney general exception prior to *Alyeska Pipeline Service Co. v. Wilderness Society, supra*, note 81 (see discussion *infra*, this sec.) include Nussbaum, "Attorney's Fees in Public Interest Litigation" (1973), 48 N.Y.U. L. Rev. 301, and Note, "Awarding Attorneys' Fees to the 'Private Attorney General': Judicial Green Light to Private Litigation in the Public Interest" (1973), 24 Hastings L.J. 733.

[106] *Newman v. Piggie Park Enterprises, Inc., supra*, note 94, and *Lee v. Southern Home Sites Corp.*, 444 F.2d 143 (5th Cir. 1971).

[107] *Supra*, note 81.

[108] See, for example, Note, "Civil Procedure - Recovery of Attorneys' Fees" (1975), 42 Brooklyn L. Rev. 351; Comment, "After Alyeska: Will Public Interest Litigation Survive?" (1976), 16 Santa Clara Law. 267; and Comment, "Alyeska Pipeline Turns Off the Tap: Can Public Interest Law Survive?" (1976), 71 Nw. U. L. Rev. 239.

outcome of the action, the plaintiff would have to pay attorneys' fees out of his own pocket, unless voluntary contributions by others were forthcoming. Evidently, the United States Congress shared this concern. Within a year of *Alyeska*, eight statutes were amended to provide for an award of attorneys' fees[109] and, in addition, Congress enacted the Civil Rights Attorney's Fees Awards Act of 1976,[110] which contained provision for awards of attorneys' fees under several civil rights statutes.

Although the *Alyeska* decision rejected the private attorney general exception to the American costs rule, considerable latitude remains for fee awards as a result of the statutory fee provisions and the common fund and substantial benefit doctrines. These exceptions are of particular importance in class litigation because they constitute the bases upon which attorneys' fees are awarded. Unfortunately, much of the debate has created the wholly misleading impression that the entitlement of a class lawyer to receive payment for services rendered to the entire class, and the amount of that payment, is determined by a contingent fee agreement that has been arranged only with the class plaintiff. This simply is not the case.

It bears repeating that while, in a class action, as in most other individual actions in the United States, a plaintiff and his lawyer may conclude a contingent fee agreement providing for the payment of fees in the event of success, that agreement will affect only the class plaintiff.[111] In order to require individual class members to contribute a portion of their recoveries to the class lawyer, there must be separate agreements with each of them. Whether this, in fact, can be achieved depends on the nature and size of the class. Where claims are small or class members are not identifiable, it will be difficult and relatively expensive to attempt to conclude individual contracts with the entire class. On the other hand, if the class consists of ascertainable members with substantial claims, agreements may be secured with less effort. In those cases where contingent agreements have been concluded with individual class members, the court, on its own motion, may nonetheless

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[109] Equal Credit Opportunity Act Amendments of 1976, Pub. L. No. 94-239, §6, 90 Stat. 253, enacting 15 U.S.C. §1691e(d); Consumer Product Safety Commission Improvements Act of 1976, Pub. L. No. 94-284, §10(d), 90 Stat. 507, enacting 15 U.S.C. §2073; Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, Title IV, §402, 89 Stat. 404, enacting 42 U.S.C. §1973*l*(e); Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, Title III, §302(3), 90 Stat. 1383, amending 15 U.S.C. §26; Toxic Substances Control Act, §§19, 20, 21, and 23, 15 U.S.C. §§2618(d), 2619(c)(2), 2620(b)(4)(C), and 2622(b)(2)(B); State and Local Fiscal Assistance Amendments of 1976, Pub. L. No. 94-488, §7(b), 90 Stat. 2349, enacting 31 U.S.C. §1244(e); Crime Control Act of 1976, Pub. L. No. 94-503, Title I, §122(b), 90 Stat. 2418, amending 42 U.S.C. §3789(c); and Copyright Act of 1976, 17 U.S.C. §505.

[110] 42 U.S.C. §1988. See Malson, "In Response to Alyeska – The Civil Rights Attorneys Fees Awards Act of 1976" (1977), 21 St. Louis U. L.J. 430; Derfner, "One Giant Step: The Civil Rights Attorney's Fees Awards Act of 1976" (1977), 21 St. Louis U. L.J. 441; and Comment, "Attorneys' Fees in Damage Actions Under the Civil Rights Attorneys' Fees Awards Act of 1976" (1980), 47 U. Chi. L. Rev. 332.

[111] See Dawson II, *supra*, note 87, at 923; Note, "Developments in the Law – Class Actions" (1976), 89 Harv. L. Rev. 1318, at 1609-10 (hereinafter referred to as "Harvard Developments"); and Comment, "Attorney's Fees, Unclaimed Funds, and Class Actions: Application of the Common Fund Doctrine" (1979), 48 Fordham L. Rev. 370, at 375.

review and set aside the agreements where they would require the payment of unreasonable fees.[112]

In the usual case – where a class lawyer does not have an agreement with any class member, except perhaps the representative plaintiff – the basis for a claim for remuneration will be either a statutory fee provision or the common fund or substantial benefit doctrine. If the class action terminates by a settlement that creates a fund for the class or culminates in a judgment that the class is entitled to monetary relief, the class lawyer, under the common fund doctrine, will apply to the court for fees to compensate him for his services that benefited class members with whom he has no contractual relations. If the class action obtains an injunction or a declaration, application to the court will be made under any applicable statutory fee provision or the substantial benefit doctrine.

Consequently, in such cases, a class lawyer's right to remuneration for his efforts on behalf of the class, although not based on a contingent fee agreement, nevertheless is contingent, because it depends on a favourable resolution of the action, either by an adjudication or by a settlement. If the action fails, no compensation for such efforts will be forthcoming, notwithstanding the lawyer's expenditure of time and effort.

(ii) Fee Assessment

a. Calculation of Attorneys' Fees

Once the entitlement of the class lawyer to remuneration is established, it becomes the task of the trial judge to assess the appropriate attorney's fee. The fact that the court has a discretion to determine fees does not distinguish class actions from individual actions. Where the exceptions to the American rule apply in individual actions, courts calculate the fee to be awarded. Cases in which attorneys' fees have been determined in individual actions constitute the background for fee assessment in class actions.

When assessing fees, courts are obliged to follow a standard of "reasonableness with reference to the particular facts of the case".[113] Although undoubtedly a sensible exhortation, this directive affords little guidance as to how fees should be calculated in particular cases. Consequently, there have been attempts by the courts[114] and by the American Bar Association[115] to give content to the concept of reasonableness by devising lists of factors that should be considered. Many of these efforts, however, have been directed to

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[112] *Dunn v. H.K. Porter Co.*, 602 F.2d 1105 (3d Cir. 1979). For commentary, see Note, "*Dunn v. Porter*: Guidelines for Federal Courts in Exercising Their Authority to Review and Set Aside Contingent Fee Agreements", [1979] Det. Coll. L. Rev. 765.

[113] *Angoff v. Goldfine*, 270 F.2d 185 (1st Cir. 1959), at 188.

[114] See, for example, *In re Osofsky*, 50 F.2d 925 (S.D.N.Y. 1931), at 927, and *Angoff v. Goldfine, supra*, note 113, at 189.

[115] See American Bar Association, *Code of Professional Responsibility*, Disciplinary Rule DR 2-106(B).

judicial fee assessment generally, and have not specifically addressed the issue in the context of class action litigation.[116] The guidelines respecting the exercise of judicial discretion have been criticized as lacking the requisite clarity and precision because they fail to explain what weight should be given to the various factors.[117] They are considered little more than hortatory enjoinders to assess a reasonable fee. The inadequacy of these guidelines has been demonstrated by the practice of some courts of stating simply that due consideration had been given to them, without explaining how the factors affected the amount of the fee that was ultimately awarded. Courts have often appeared to review the criteria as a *pro forma* exercise, unrelated to the factual circumstances of the particular case.[118]

Turning to a consideration of how courts have calculated the amount of attorneys' fees in class actions, it may be observed that the courts have altered their general approach over the years. Formerly, courts sought to assess the value of lawyers' services by examining a number of factors, but emphasizing the amount of the monetary recovery or the value of the benefit conferred on the class; the usual result was the application of a percentage formula to the class recovery.[119] The new trend, which is becoming the dominant approach, has been to calculate fees by reference to various factors designed to measure the value of the services performed, with particular attention being given to the time expended by the lawyer.[120] It has been suggested that the transition from an emphasis on the amount of the recovery to an emphasis on the time expended may have been precipitated by criticism of the size of fee awards by certain courts and commentators.[121]

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[116] See, however, Federal Judicial Center, Board of Editors, *Manual for Complex Litigation* (1978) (Clark Boardman), §1.47, at 96-96.1, *n.* 127 (hereinafter referred to as "Manual"), where the editors suggest that, in class actions, the following factors, among others, should be considered: "(1) that in seeking and accepting employment as counsel for a judicially determined class an element of public service is involved; (2) the representation of the class by counsel is not a result of private enterprise but results from provisions of an opportunity to represent the class by a judicial determination; and (3) the policy of the law in class actions, including antitrust actions, is to provide a motive to private counsel to represent consumers and to enforce the laws".

[117] In *City of Detroit v. Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974), at 470, the Court of Appeals for the Second Circuit stated that "more is needed than a mere listing of factors. Such a list, standing alone, can never provide meaningful guidance." One commentator has referred to the lists of factors as "essentially meaningless litanies": see Dawson II, *supra*, note 87, at 927.

[118] See Mowrey, *supra*, note 93, at 304-06; Note, "Computing Attorney's Fees in Class Actions: Recent Judicial Guidelines" (1975), 16 B.C. Ind. & Com. L. Rev. 630, at 632-33 (hereinafter referred to as "Recent Judicial Guidelines"); Smith, "Standards for Judicial Approval of Attorneys' Fees in Class Action and Complex Litigation" (1977), 20 How. L.J. 20, at 28-29; and Note, "Attorneys' Fees - Conflicts Created by the Simultaneous Negotiation and Settlement of Damages and Statutorily Authorized Attorneys' Fees in a Title VII Class Action" (1978), 51 Temple L.Q. 799, at 807-08.

[119] The earlier approach is described in Mowrey, *supra*, note 93, at 334-38.

[120] See Miller, *Attorneys' Fees in Class Actions* (1980), at 60-62.

[121] In *City of Detroit v. Grinnell Corp., supra*, note 117, at 469, the Court stated that, "[f]or the sake of their own integrity, the integrity of the legal profession, and the integrity of Rule 23, it is important that the courts should avoid awarding 'windfall fees' and that they should likewise avoid every appearance of having done so".

Crucial to this development were two decisions of the Court of Appeals for the Third Circuit in *Lindy Brothers Builders, Inc. v. American Radiator & Standard Sanitary Corp.*[122] These decisions and others[123] sought to bring a coherent method to the judicial assessment of attorneys' fees in class action litigation. In view of the impact of the so-called "*Lindy* approach", it is necessary to describe it in some detail.

The *Lindy* case was an antitrust class action that terminated with the creation of a settlement fund from which the class lawyers, relying on the common fund doctrine, sought fees for efforts on behalf of class members with whom they had no contingent fee agreements. In an express effort to rationalize fee determination, the Third Circuit Court of Appeals devised a method intended to achieve the fundamental objective of fee determination in class actions – "to compensate the attorney for the reasonable value of services benefiting the unrepresented claimant".[124] Briefly, the prescribed method of fee assessment first requires the court to calculate the number of compensable hours spent by the lawyer in activities on behalf of the class. The amount of time is then multiplied by its value, that is, the lawyer's "normal billing rate",[125] which conceivably may vary for different activities. After the resulting product, which the Court termed the "lodestar", is calculated, it is adjusted to take account of two factors: the quality of work demonstrated by the lawyer in the conduct of the case, and the fact that payment of the lawyer is contingent on success.[126] After the reasonable value of the lawyer's services

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[122] 341 F. Supp. 1077 (E.D. Pa. 1972), vacated and remanded 487 F.2d 161 (3d Cir. 1973) (the latter hereinafter referred to as "*Lindy I*"), on remand 382 F. Supp. 999 (E.D. Pa. 1974), and 540 F.2d 102 (3d Cir. 1976) (*en banc*) (the latter hereinafter referred to as "*Lindy II*"). The evolution of the *Lindy* standards is described in *Barrett v. Kalinowski*, 458 F. Supp. 689 (M.D. Pa. 1978), at 701-03. For a description of the newer approach, see Manual, *supra*, note 116, §1.47, at 97-106; Mowrey, *supra*, note 93, at 338-40; and Harvard Developments, *supra*, note 111, at 1611-13.

[123] See *City of Detroit v. Grinnell Corp., supra*, note 117, which presented a similar analysis. Another influential appellate court decision was *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), which established twelve factors that should be examined by a court in assessing lawyers' fees but, unlike *Lindy*, did not set out a step-by-step method of computation.

[124] *Lindy I, supra*, note 122, at 167.

[125] See Mowrey, *supra*, note 93, at 323-25; Recent Judicial Guidelines, *supra*, note 118, at 647; and Harvard Developments, *supra*, note 111, at 1613, *n.* 150.

There has been some controversy whether hourly rates can be assigned to the work performed by class lawyers. Hourly rates are given in respect of services that are not performed on a contingent basis and, therefore, lend themselves to the establishment of standard fees. Class litigation in the United States, however, is almost invariably undertaken by lawyers on a contingent basis. For example, Wright and Miller, *supra*, note 77, Vol. 7A (Curr. Supp. 1981), §1803, observed as follows (at 228):

> [T]he notion that there are fixed hourly rates that can be attributed to all lawyers and used as objective markers of the worth of their services is somewhat of an illusion. These rates have never existed for contingent fee lawyers, since time and hourly rates are irrelevant for their type of practice.

See, also, Mowrey, *supra*, note 93, at 324, and Newberg, *supra*, note 83, Vol. 3, §6924d, at 1148.

[126] *Lindy I, supra*, note 122, at 166-69.

on behalf of the entire class is determined, the unrepresented class members pay a percentage of that amount equal to their percentage recovery from the fund.[127] In *Lindy II*, the Third Circuit Court of Appeals refined the analytical process by providing a fuller explanation of the contingency and quality of work factors.[128]

As indicated above, the intention of the *Lindy* decisions was to rationalize the method of fee assessment by putting it on a more objective basis than was hitherto evident in the use of a percentage formula. While, by comparison to the earlier method of fee assessment, the *Lindy* approach does systematize the method of fee assessment, it remains a subjective exercise in which the court, at each stage of the analysis, must make judgments about matters incapable of precise quantification.

Even the starting point, the determination of the time spent by the lawyer, obliges the court to render subjective judgments. The court must ascertain whether the lawyer's activities in respect of which time is claimed did, in fact, enure to the benefit of the class.[129] In determining the amount of compensable time, courts seek to ensure that lawyers do not engage in unnecessary preparation and duplication of effort in order to inflate their fees.[130] The nature of the inquiry demanded by the emphasis on time spent on behalf of the class requires lawyers to submit, and therefore to maintain, comprehensive information about their activities. A further incentive to keep precise records has been created by the practice of some courts of disregarding unrecorded time, unless it can be substantiated by other means.[131]

As we have indicated, the *Lindy* decisions require courts to multiply the hours spent on behalf of the class by the "normal billing rate". In fulfilling this directive, courts appear to have adopted different approaches. While some decisions appear to take a subjective approach, relying on the lawyer's statement of his hourly rate, others prefer to assign a rate based on a consideration of more objective standards.[132]

As we have explained, the "lodestar" – which is the product of the time spent on behalf of the class multiplied by the "normal billing rate" – may be increased to reflect the influence of two factors, namely, the quality of the

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[127] See text accompanying note 124, *supra*.

[128] *Lindy II*, *supra*, note 122, at 116-18.

[129] See Newberg, *supra*, note 83, Vol. 3, §6925, at 1153-56, and Mowrey, *supra*, note 93, at 319-20.

[130] See Note, "Computing Attorney's Fees in Individual and Class Action Antitrust Litigation" (1972), 60 Calif. L. Rev. 1656, at 1667; Dawson II, *supra*, note 87, at 927-28; Mowrey, *supra*, note 93, at 322-23; Smith, *supra*, note 118, at 64-66; Recent Judicial Guidelines, *supra*, note 118, at 644; Harvard Developments, *supra*, note 111, at 1617; and Wright and Miller, *supra*, note 77, Vol. 7A (Curr. Supp. 1981), §1803, at 228-29.

[131] See Manual, *supra*, note 116, §1.47, at 105; Smith, *supra*, note 118, at 39-41; and Newberg, *supra*, note 83, Vol. 3, §6125, at 1153-54.

[132] For example, in *City of Detroit v. Grinnell Corp.*, *supra*, note 117, at 471, the Court referred to "the hourly amount to which attorneys of like skill in the area would typically be entitled for a given type of work".

lawyer's work and the contingent nature of success. In assessing the former, a court is interested in the quality of work demonstrated in the course of the particular litigation, rather than in an evaluation of the lawyer's ability in a general sense.[133] This inquiry will include an examination of the lawyer's performance in court, conduct of negotiations, and administration of the class action. If the quality shown is unusually high or unusually low, the compensation is adjusted accordingly.

In evaluating the quality of services rendered, a factor inevitably cited is the nature of the issues involved in the class action. Not surprisingly, novel or complex issues are thought to demand greater ingenuity and industry in order to bring the suit to a successful conclusion.[134] Whether the litigation will be judged to have this character may depend on whether the position of the class has been assisted by the existence of legal precedent or antecedent government proceedings, either of which likely will ease the task of the class lawyer.[135] The quality of work also will be assessed having regard to the result achieved.[136] For example, a larger recovery realized in a relatively short period of time normally demonstrates the exercise of superior skill by the class lawyer.

The contingent nature of success is a factor that is to be considered independently of the quality of work factor. Increasing the "lodestar" amount and, hence, the fee award, to reflect this factor is intended to take account of the economic realities of class litigation – or, more specifically, the financial risk undertaken by a class lawyer.[137]

In class litigation, compensation will be forthcoming only after the investment of a substantial amount of time and effort by the lawyer. While not receiving any remuneration for his or her work, the usual expenses of running an office are being incurred. Moreover, substantial advances may be made on behalf of the client to pay for the enormous expenses incurred in the action, which would augment significantly the financial risk assumed by the class lawyer.

In conducting litigation on this basis, the position of a class lawyer

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[133] In *Lindy II, supra*, note 122, at 117, Aldisert J., who gave the opinion of the Court (Gibbons and Seitz JJ. concurring in part and dissenting in part), stated that "counsel who possess or who are reputed to possess more experience, knowledge and legal talent generally command hourly rates superior to those who are less endowed. Thus, the quality of an attorney's work *in general* is a component of the reasonable hourly rate; this aspect of 'quality' is reflected in the 'lodestar' and should not be utilized to augment or diminish the basic award under the rubric of 'the quality of an attorney's work' " (emphasis in original). See, also, Mowrey, *supra*, note 93, at 307-11, and Newberg, *supra*, note 83, Vol. 3, §6931, at 1198-99.

[134] See Newberg, *supra*, note 83, §6933, at 1200-02; Smith, *supra*, note 118; and Wright and Miller, *supra*, note 77, Vol. 7A (Curr. Supp. 1981), §1803, at 231-32, *n.* 62.12.

[135] See Newberg, *supra*, note 83, Vol. 3, §6933, at 1200.

[136] See Mowrey, *supra*, note 93, at 311-18.

[137] For a discussion of the economics of class litigation, see Note, "Developments – Attorney Fee Awards in Antitrust and Securities Class Actions" (1980), 6 C.A.R. 84, at 132-33, and Newberg, *supra*, note 83, Vol. 3, §6926a, at 1166-67.

compares unfavourably with that of a lawyer who performs non-contingent work compensable on a certain or hourly basis. If a class lawyer were not compensated in a manner that reflected the risk of failure, in addition to being reimbursed for his investment of time and resources, it is argued that lawyers would prefer to undertake other kinds of work for which payment was certain.

A court's examination of the contingency factor at the termination of a class action is an *ex post facto* assessment of the probability of success. The court engages in a retrospective inquiry in which the risk of failure is evaluated from the perspective of the time the action was initiated. In considering the contingency factor, courts have identified certain elements that, in their view, bear upon the probability of success. These elements have been summarized as follows:[138]

> At the outset it is helpful to outline the various elements of the contingency factor. Analysis of these elements will focus on their positive or negative effects on certainty of success. The risk of success or failure requires consideration, for example, of the presence or absence of prior governmental proceedings or prior legal precedent. These two elements are often cited as affecting the contingency factor, but their importance can only be assessed in light of the specific facts of each controversy.[139] For this reason, the likelihood of obtaining a favorable liability judgment, and the risks involved in proving damages even after liability is shown, are particularly important. The risk that the damages proved will be disproportionate to the litigation efforts expended, thus resulting in inadequate compensation is also present. The contingencies in obtaining class certification present another large hurdle. The decision to commit a lawyer's time, money and personnel to resolution of the class action issues represents a unique risk borne by the attorney, though the class representative remains personally responsible for costs should the case be dismissed. Additionally, the vigor and capabilities of the defense may increase the difficulties, and the risk of litigating the counsel fee petition remains.

Although the *Lindy* approach was developed in the context of an application for fees from a settlement fund, its impact has extended beyond that context. Courts have held that this approach is to be followed where the defendant has agreed to pay reasonable attorney's fees in addition to a settlement fund.[140] Where fees are assessed pursuant to statutory fee provisions, the *Lindy* approach also has influenced the method of fee calculation.[141]

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[138] Newberg, *supra*, note 83, Vol. 3, §6926, at 1165.

[139] The effect of prior government proceedings appears to be uncertain. It has been suggested that, from the perspective of the class lawyer, the risk of failure will be reduced where there has been a criminal conviction or where "substantial investigations undertaken by the government indicate that a private party can prove guilt in a separate trial". Short of a guilty plea or a guilty verdict after trial, there will not be a substantial reduction in the contingency factor. However, in the course of a particular proceeding, evidence supporting the class may be generated, which would attenuate the risk. The absence of any governmental proceeding accentuates the complexity and novelty of the action, thereby increasing the risk of failure assumed by counsel: see Newberg, *supra*, note 83, Vol. 3, §6926b, at 1179, and §6926i, at 1180.

[140] *Merola v. Atlantic Richfield Co.*, 493 F.2d 292 (3d Cir. 1974), and *Merola v. Atlantic Richfield Co.*, 515 F.2d 165 (3d Cir. 1975).

[141] *Hughes v. Repko*, 578 F.2d 483 (3d Cir. 1978); *Northcross v. Board of Education of Memphis City Schools*, 611 F.2d 624 (6th Cir. 1979), *cert.* denied 100 S. Ct. 2999 (1980); and *Copeland v. Marshall*, 641 F.2d 880 (D.C. Cir. 1980).

While there has been some criticism of the *Lindy* approach,[142] a recent study of attorneys' fees in class actions, commissioned by the Federal Judicial Center,[143] reveals its importance. The study confirms that there is a growing trend to emphasize the time and labour expended by the lawyer. But it also demonstrates that the method of fee assessment is not yet sufficiently consistent to warrant a conclusion that there is a firmly established practice. Variations exist among the eleven federal court circuits and among the courts within each circuit. However, while the *Lindy* approach has not been rigidly followed by all courts, it has been generally accepted in preference to the earlier approach that emphasized the amount of the recovery.

b. Procedure

In the United States, attorneys' fees in class actions are determined by the court at a hearing, upon the application of the class lawyer. Where a suit terminates by settlement, usually the hearing is scheduled simultaneously with the hearing for the approval of the settlement.[144] As indicated, the fees that are the subject of the lawyer's application are intended to compensate him for services on behalf of class members with whom he has no contractual relations.[145]

With his application to the court for fees, a class lawyer must submit supporting affidavits and memoranda outlining the basis of his claim. The lawyer must provide a detailed description of the nature and progress of the class action, his efforts on behalf of the class, and their results.

An application for fees may be opposed by class members, either individually or in a group, by the defendant, or by other lawyers who have participated in the action.[146] To a great extent, the source of payment will

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[142] See Newberg, *supra*, note 83, Vol. 3, §6924d, at 1148-50, and §6935, at 1205-06. See, also, Leubsdorf, "The Contingency Factor in Attorney Fee Awards" (1981), 90 Yale L.J. 473, and Herzel and Hagan, "Plaintiffs' Attorneys' Fees in Derivative and Class Actions" (1981), 2 Litigation 25.

[143] See Miller, *supra*, note 120.

[144] See *infra*, ch. 20.

[145] Some class lawyers have applied for attorneys' fees from the shares of class members who have retained their own lawyers. These attempts have met with mixed results. Certain courts, concerned with the assessment of "double fees", have refused to award fees in respect of represented class members, while others, adhering strictly to the common fund doctrine, have ordered that fees be paid: see Newberg, *supra*, note 83, Vol. 3, §§6980-6980g, at 1277-90.

[146] Lawyers, other than the lawyer retained by the representative plaintiff, may be participating in the class action as counsel for other representative plaintiffs or intervenors. Where the class action has produced a fund, either as a result of a settlement or an adjudication, these lawyers may apply for fees, challenging the fee application of the class lawyer, on the basis that their efforts have contributed to the creation of the fund, and that their services should be compensated accordingly.

Competition for fees obliges the court to deal with certain allocational and distributional questions. Where the lawyers and the defendant settle by agreement both the amount of the fee and to whom it is to be distributed, the approval of the court still is necessary. In the absence of agreement, the court will have to determine how a global

determine who will challenge it. For example, in a settlement agreement, if the defendant has arranged to pay a fee over and above the settlement fund, or if the defendant is liable to pay attorneys' fees under a statutory provision, he will have an interest in attempting to persuade the court to assess a lower fee than that requested by the lawyer. If the fee is to be deducted from a settlement fund otherwise payable to the class, class members will have an economic interest in arguing that it is excessive because it will reduce their shares. In view of this interest, notice of an impending fee hearing is sent to them.

A controversial procedural issue has concerned whether the fee assessment should be a hearing involving *viva voce* testimony, the presentation of documentary evidence, cross-examination, and pre-hearing discovery.[147] The alternative to such a formal proceeding is a court determination relying exclusively on documentary material. It seems that the former type of hearing is mandatory where it appears from the fee application that facts are in dispute, even where there has been no formal challenge to the lawyer's claims, or where one or more objecting class members wish to present evidence.[148]

After the court has determined the fee, it must consider how the burden is to be borne by members of the class. The general rule is that class members bear the burden on a *pro rata* basis. Until resolved by a recent decision of the United States Supreme Court, there was an issue whether class members who have not claimed their shares should be required to contribute to attorneys' fees on a *pro rata* basis. In *The Boeing Company v. Van Gemert*,[149] Mr. Justice Powell, who delivered the opinion of the Court, stated that, since "[t]he right to share the harvest of the lawsuit, upon proof of their identity, whether or not they exercise it, is a benefit in the fund created by the efforts of the class representatives and their counsel",[150] class members who do not claim their shares should nonetheless be obliged to contribute on a *pro rata* basis to the award of attorneys' fees.

Once the amount of the fee is settled, it is a simple matter to secure payment. Before individual shares of the recovery are distributed to class members, the fees are deducted from the fund and the amount of the individual shares is reduced accordingly.[151]

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amount is to be divided among lawyers claiming fees. If there is no agreement as to the total amount of the fees, the court will determine the individual fee applications of the various lawyers, rather than assess a global sum. In cases where the theoretical basis of the award of the attorney's fee is to reward services that have benefited the class members with whom the lawyers have no contractual relationship, the inquiry necessarily will focus first on the question of whether the activities of the particular lawyer benefited the class.

[147] See Mowrey, *supra*, note 93, at 292-94.

[148] *Lindy I, supra*, note 122, at 169; *City of Detroit v. Grinnell Corp., supra*, note 117, at 468; and *Piambino v. Bailey*, 610 F.2d 1306 (5th Cir. 1980), at 1328.

[149] *Supra*, note 81. For a discussion of this case, see *supra*, ch. 14, sec. 3(b)(i).

[150] *The Boeing Company v. Van Gemert, supra*, note 81, at 750.

[151] See Newberg, *supra*, note 83, Vol. 3, §6970a, at 1256-57.

(iii) Conflict of Interest

In the United States, the subject of attorneys' fees has been a matter of some controversy. Much of the debate has focused on two issues – whether the basis of fee awards and the method of fee determination involve a class lawyer in a conflict of interest, and whether attorneys' fees have been inordinately large. We propose to review these questions separately, although they are not unrelated.

There has been considerable discussion of the question whether the fact that fees in class actions are contingent creates a conflict of interest between the class lawyer and the class in which there is a danger that the interests of the latter will be sacrificed to the interests of the former.[152] It has been argued that, because the lawyer's entitlement to compensation is contingent upon a favourable adjudication or a settlement that benefits the class, his interest in securing a fee will cause him to agree to settle the class suit, rather than to risk failure at trial and the loss of remuneration.[153] Some commentators have suggested that the purported conflict of interest produces even more extreme conduct on the part of the lawyer. They have contended that, not only will a lawyer be tempted to settle without proper concern for the interests of the class, but he will have a tendency to arrange a settlement that will provide for a small class recovery and a large fee.[154] Whether this particular proclivity can be demonstrated has been the subject of disagreement.[155]

That class actions involve a potential conflict of interest between the class lawyer and the class has not been questioned, even by the most ardent supporters of class actions.[156] In a sense, this conflict is an intrinsic feature of litigation conducted on a contingency basis because, from the moment that the action is commenced, there is a possibility that settlement discussions may be initiated. When the matter of settlement is raised, it puts the class lawyer's fee in issue, which creates a conflict of interest. If the suit is settled, what hitherto has been a contingent fee is converted into a certain fee. Although, in theory, any negotiations by the lawyer with the defendant are conducted on behalf of the class, the prospect of ensuring remuneration might persuade the class lawyer to agree to a settlement, when he might have sought higher damages in an action, the outcome of which would be

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[152] See Harvard Developments, *supra*, note 111, at 1608-11; Rosenfield, "An Empirical Test of Class Action Settlement" (1976), 5 J. Legal Studies 113; Diehl, "Attorney's Fees in Class Actions: A Closer Look" (1978), 5 C.A.R. 214; Dam, "Class Actions: Efficiency, Compensation, Deterrence, and Conflict of Interest" (1975), 4 J. Legal Studies 47; Posner, "An Economic Approach to Legal Procedure and Judicial Administration" (1973), 2 J. Legal Studies 399; and Note, "Attorney's Fees - Conflicts Created by the Simultaneous Negotiation and Settlement of Damages and Statutorily Authorized Attorneys' Fees in a Title VII Class Action" (1978), 51 Temple L.Q. 799.

[153] See Harvard Developments, *supra*, note 111, at 1605.

[154] See Rosenfield, *supra*, note 152, at 114-15, and Posner, *supra*, note 152, at 441.

[155] Conflicting views are expressed in Diehl, *supra*, note 152, and Rosenfield, *supra*, note 152.

[156] For example, the editor of the Class Action Reports acknowledges its existence: see Note, "Developments: So-Called Legal Ethics" (1975), 4 C.A.R. 598, at 601-02.

uncertain. Fear of failure and the consequential loss of the fee might take precedence over a concern for the best interests of the class.

If it were possible to conclude a contingency agreement with a representative plaintiff that required the fee to be calculated as a percentage of the class recovery, or a certain sum to be paid in the event of success, the conflict of interest between the class lawyer and the class would become particularly acute, because the decision whether to settle the action would affect the amount of the lawyer's fee in relation to the time expended on behalf of the class. Thus, an early settlement for a smaller fee might constitute relatively substantial remuneration.[157] Where the class lawyer is negotiating with the defendant about both the amount of the settlement fund and the amount of his fee over and above the fund, there is a potential conflict of interest as well.[158]

Despite general acceptance that a potential conflict of interest lies in a class lawyer's incentive to settle as a result of the contingent nature of his remuneration, it appears to us that the danger that it will lead to the sacrifice of the interests of the class has been exaggerated.[159] First, settlements in class actions must receive judicial approval after notice has been given to the class.[160] Therefore, one would expect that, to some extent, the inevitability of

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[157] In *Saylor v. Lindsley*, 456 F.2d 896 (2d Cir. 1972), at 900-01, a shareholder's derivative action in which payment was contingent, this conflict was discussed:

> The plaintiff's financial interest is in his share of the total recovery less what may be awarded to counsel, *simpliciter*; counsel's financial interest is in the amount of the award to him less the time and effort needed to produce it. A relatively small settlement may well produce an allowance bearing a higher ratio to the cost of the work than a much larger recovery obtained only after extensive discovery, a long trial and an appeal. The risks in proceeding to trial vary even more essentially. For the plaintiff, a defendant's judgment may mean simply the defeat of an expectation, often of relatively small amount; for his lawyer it can mean the loss of years of costly effort by himself and his staff .... We say this not in criticism but in simple recognition of the facts of class action life.

[158] The following passage from Posner, *supra*, note 152, at 440-41, presents this argument:

> Class actions have another weakness. There is a potential conflict of interest between the lawyer for the class and the members of the class. Since the lawyer is presumably interested in his fee rather than in the judgment as such, he will be tempted to settle with the defendant, on behalf of the class, for a small judgment plus a large attorney's fee. Such an arrangement will often be attractive to the defendant too, since he is interested in the total payout rather than in how it is divided between the lawyer and the class. The losers are the class members.

There has been some disapproval of settlement agreements that provide for direct payment of attorneys' fees by the defendant to the class lawyer: see *Jamison v. Butcher*, 68 F.R.D. 479 (E.D. Pa. 1975), and *Prandini v. National Tea Co.*, 557 F.2d 1015 (3d Cir. 1977). The editors of the *Manual for Complex Litigation* also disapprove of simultaneous negotiation for the settlement fund and attorneys' fees: see Manual, *supra*, note 116, §1.46, at 91-92. See, also, Note, "Attorneys' Fees - Conflicts Created by the Simultaneous Negotiation and Settlement of Damages and Statutorily Authorized Attorneys' Fees in a Title VII Class Action" (1978), 51 Temple L.Q. 799, and Mowrey, *supra*, note 93, at 282-83.

[159] See Miller, "Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the 'Class Action Problem' " (1979), 92 Harv. L. Rev. 664, at 681.

[160] Fed. R. Civ. P. 23(e), promulgated at 383 U.S. 1029 (1966).

judicial scrutiny would discourage abusive behaviour, certainly the most egregious varieties, which would be readily detectable.

One *caveat*, however, should be noted. Where the class lawyer has concluded a settlement with the defendant, it is in the interests of both parties to receive court approval. Consequently, at the hearing to approve the settlement, the interests of the class lawyer and defendant might be congruent, in which case neither would reveal to the court any aspects of the agreement that would be disadvantageous to the class. In such a case, the protection of the interests of the class would depend on the vigilance of the court and the possibility that absent class members who had received notice of the settlement would alert the court if they thought that it was unfair.

A second factor that attenuates the impact of the conflict of interest is that, in addition to approval of a settlement, the court is responsible for setting attorneys' fees. Even if the class lawyer and the defendant agree on a fixed fee or establish a method for its calculation, the fee nonetheless will be subject to review and approval by the court. Agreement by the defendant and class lawyer in no way forecloses judicial scrutiny.[161]

The final factor that reduces the practical effect of the conflict of interest is the method of fee calculation. The advent of the *Lindy* approach, with its emphasis on the time expended on behalf of the class, renders class lawyers less able to conclude settlement agreements that grant them a larger return in relation to their efforts. The starting point for a fee determination – the "lodestar" – is the value of the compensable hours spent on behalf of the class. This imposes a constraint on the quantum of fees that will be awarded. The earlier, pre-*Lindy* approach to fee assessment, relying on the application of a percentage to the recovery, did present much greater opportunity for the lawyer to sacrifice the interests of the class. A lawyer might agree to a settlement, anticipating that the use of the percentage formula would bring a relatively larger fee than would be obtained if the class action continued. The independence of the amount of the fee from the time expended enabled a lawyer to achieve a higher return in relation to his efforts.

Although the factors described above do serve to mitigate the negative effects of the conflict of interest between lawyer and class, problems caused by the existence of the conflict have not been overcome entirely. Whether the lawyer decides to settle at all is unaffected by the method of fee calculation. A class lawyer, unsure about the possibility of success at trial, may agree to a settlement simply in order to ensure that he receives his fee. If the action is settled for this reason, he is acting exclusively, or at least primarily, out of self-interest, in disregard of his obligation to act on behalf of class members.

The process of neutralizing the conflict of interest by means of judicial scrutiny of both settlements and fee awards is not, of course, perfect. Failure to conduct a rigorous examination might allow collusion between the defendant and class lawyer to escape undetected. Moreover, in a fee determination, courts depend on the applicant lawyer to provide the necessary

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[161] *Foster v. Boise-Cascade, Inc.*, 420 F. Supp. 674 (S.D. Tex. 1976), aff'd 577 F.2d 335 (5th Cir. 1978).

information. There may be no other person participating in the hearing to challenge the documentation or submissions of the class lawyer. The amount of the claims of individual class members may not afford a sufficient incentive for them to incur the financial and emotional cost of challenging the fee application.[162] Nor will the defendant be an interested party, unless the fee is assessed against him as an item in addition to his payment of the settlement fund. Where the fee is to be deducted from the fund, the defendant ordinarily will cease to have an interest in further participation.[163] He will have a continuing interest only if a settlement agreement were to provide that any portion of the fund that was undistributed would revert to him.

On balance, however, we believe that mandatory judicial approval of settlements and fees, and a method of fee assessment based on the amount of time spent on behalf of the class, help to control improper behaviour. In our view, confidence may justifiably be reposed in judicial scrutiny to protect the interests of the class.

(iv) Are Attorneys' Fees in Class Actions "Excessive"?

Among the most persistent charges made by critics of class actions is that class lawyers are able to obtain enormous fees in relation to the work actually performed on behalf of the class.[164] In chapter 4 of this Report, where we considered the costs and benefits of class actions, we examined the available empirical data bearing upon this issue. At this juncture, it is necessary only to reiterate our conclusions. It was our view that the empirical studies do not indicate that the proportion of class action awards consumed by attorneys' fees and ancillary administrative costs has been unreasonable, in light of the complexity of class litigation. Furthermore, we observed that the percentages revealed by these studies do not compare unfavourably with the average percentage of recoveries consumed by lawyers' fees in individual litigation in Ontario.[165]

(b) Costs and Expenses

Earlier in this chapter, we stated that, with respect to litigation in the United States, it is necessary to examine attorneys' fees as a subject distinct from costs and expenses incurred in an action[166] because the rules governing the latter differ from those governing the former. In addition, we observed that, with respect to the payment of costs and expenses, certain economic

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[162] See Rosenfield, *supra*, note 152, at 114-17.

[163] See Harvard Developments, *supra*, note 111, at 1608, *n.* 132.

[164] For example, in *Free World Foreign Cars Inc. v. Alfa Romeo*, 55 F.R.D. 26 (S.D.N.Y. 1972), at 30, the Court referred to a "golden harvest of fees". In *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555 (2d Cir. 1968), at 571, Lumbard C.J., dissenting, remarked that "[o]bviously the only persons to gain from a class suit are not potential plaintiffs, but the attorneys who will represent them".

[165] See *supra*, ch. 4, sec. 3(e)(i).

[166] See, generally, Wright and Miller, *supra*, note 77, Vol. 10, §§2665-2679, at 122-243.

barriers remain that might deter individuals from coming forward to serve as class plaintiffs.

In the United States, certain litigation expenses may be awarded to a successful party from his opponent. These expenses are called "costs" or "taxable costs". A court may make such an order under Rule 54(d) of the Federal Rules of Civil Procedure,[167] which provides that costs generally are to be allowed to a prevailing party, or under a statutory provision that provides that costs, as well as attorneys' fees, are to be paid by an unsuccessful party to his adversary.[168] Not all expenses incurred in connection with an action, however, are within the ambit of taxable costs, and those that are not must be borne by a successful litigant.

In a class action, insofar as litigation expenses are concerned, the class plaintiff may be in a somewhat better position than a plaintiff in individual litigation. First, it appears that, in class actions, where there has been a litigated judgment against a defendant, some courts have expanded the ambit of taxable costs to include additional kinds of expense.[169] Secondly, where there is a settlement fund or a judgment for damages, a lawyer or representative plaintiff who has paid litigation expenses in the course of the action is entitled to be reimbursed for them from the fund according to the unjust enrichment rationale of the common fund doctrine. This reimbursement is on a more liberal scale than available on a taxation of costs against an unsuccessful party.[170]

Like attorneys' fees, any expenses that are recoverable are awarded at the conclusion of a successful action. Ongoing litigation expenses must be paid during the course of the action and assumed in the event of failure. Due to the length and complexity of class actions, it is evident that the usual expenses will be substantially greater than in individual suits. To these expenses must be added, in class actions brought under Rule 23(b)(3), the potentially enormous costs of mandatory post-certification notice.[171]

There are three possible ways that the burden of paying litigation expenses may be met.[172] First, the class representative may decide to pay

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[167] Fed. R. Civ. P. 54(d) provides that, "[e]xcept when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law. Costs may be taxed by the clerk on one day's notice. On motion served within 5 days thereafter, the action of the clerk may be reviewed by the court."

[168] Many of the statutory fee provisions that are exceptions to the American rule provide that "costs, including reasonable attorneys' fees" are to be paid, or employ similar language.

[169] See Newberg, *supra*, note 83, Vol. 3, §6990e, at 1294-95, and Harvard Developments, *supra*, note 111, at 1619, *n.* 170.

[170] See Newberg, *supra*, note 83, Vol. 3, §6990, at 1290.

[171] For a discussion of post-certification notice under Fed. R. Civ. P. 23(b)(3), see *supra*, ch. 13, sec. 2(a).

[172] See Bullock, "Discovery of Plaintiffs' Financial Situation in Federal Class Actions: Heading 'em off at the Passbook" (1978), 30 Hastings L.J. 449, at 451-54.

them himself. In all but a few cases, it would be unreasonable to expect him to do this; in prosecuting the action, large sums will have to be expended, with the prospect of reimbursement uncertain, and possibly deferred for several years. Furthermore, in many cases, the potential individual recovery of the class representative will be very small in comparison to litigation expenses. Economically rational persons will not choose to spend enormous amounts that will far exceed such recovery.[173]

A second alternative would be to attempt to secure agreements to pay costs from the absent class members. The Committee on Ethics and Professional Responsibility of the American Bar Association has stated that, unless a tribunal or court has ruled otherwise, it is ethically proper for either the class representative or the class lawyer to solicit funds to be used to defray the expenses of a class action.[174] Solicitation, however, is not likely to be successful, due to the natural reluctance of class members to contribute funds when they can enjoy the benefits of the suit without any donation, unless they are members of an organization through which a contributory scheme can be organized. Moreover, class members may be very hesitant to donate money early in the litigation, particularly prior to certification, when the inherent uncertainties of the class action are most acute, thereby rendering any monetary investment highly speculative.[175] Another practical problem for the class plaintiff is that the solicitation of funds or the negotiation of cost-sharing agreements may themselves be costly activities. The expense of communicating with the entire class in the hope of persuading its members to share costs may exceed the contributions eventually realized.

The final alternative is to put the payment of litigation expenses on the same basis as the payment of attorneys' fees. As we have seen, the existing practice with respect to fees is that, by working on a contingent basis, the class lawyer is, in effect, advancing his fees to the class, with the hope of payment in the event of success. In theory, it should be equally possible for the class lawyer to advance the ongoing expenses of the class action on the

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[173] In the following passage from Harvard Developments, *supra*, note 111, at 1620-21, *n.* 176, the impracticability of relying on the class representative is discussed:

> Reliance upon the named plaintiff to finance [a] class suit may not only be unfair but also impractical. Although the named plaintiff may have an individually recoverable damage claim, the added costs of bringing a class suit may well exceed the amount of his expected recovery. In many damage class actions, no class members will have individually recoverable claims, and in fact the combined recoveries of even ten or twelve named plaintiffs may be far less than the expected class costs. In a class suit for injunctive relief, it is similarly unlikely that a named plaintiff would have the resources or the desire unilaterally to guarantee class costs for the benefit of a class from whom those costs could not subsequently be recovered should the suit fail.

[174] American Bar Association, Committee on Professional Ethics, *Informal Opinion No. 1326* (May 27, 1975), states that a lawyer may solicit funds from class members to be used for expenses only in connection with the preparation for litigation of a class action, or for the expense of mailing notice, but that it is not proper for an attorney to solicit funds for his own compensation from class members. The attorney is allowed, however, to receive funds solicited by one class member from other members for the express purpose of compensating the attorney.

[175] See Note, "Developments – Legal Ethics" (1974), 3 C.A.R. 174, at 177.

understanding that he will bear the financial consequences of failure. In the United States, however, such an arrangement is forbidden expressly by Disciplinary Rule 5-103(B) of the American Bar Association Code of Professional Responsibility, which does not allow a lawyer in any kind of action to advance or to guarantee the expenses of litigation, including court costs, unless "the client remains ultimately liable for such expenses".[176] Violation of this prohibition is considered to be improper maintenance of a suit by a lawyer. The Rule has been justified on the ground that, by advancing the expenses of the action, the lawyer will acquire a personal financial interest in the outcome of the litigation, which will impair his ability to fulfil his obligation to exercise independent professional judgment solely for the benefit of the client.[177]

Although it is certainly possible to accept this argument in the abstract, it is difficult to understand how it can be reconciled with the well-entrenched practice of permitting contingent fee contracts. In litigation where remuneration is contingent, the lawyer undoubtedly has a financial interest in the outcome of the suit. Moreover, in class actions, attorneys' fees almost invariably are contingent, so that there ordinarily is a financial interest in the outcome of the suit in any event.[178] While the American Bar Association acknowledges that contingent fee arrangements give the lawyer a financial interest in the litigation, its view is that whatever disadvantage this entails is outweighed by the policy in favour of facilitating access to legal services for persons who otherwise cannot afford them.[179] However, with respect to the

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[176] The American Bar Association Code of Professional Responsibility consists of Canons, Ethical Considerations, and Disciplinary Rules. The preliminary statement to the Code explains that Disciplinary Rules "are mandatory in character. The Disciplinary Rules state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action."

In 1980, the Commission on Evaluation of Professional Standards, which was appointed by the American Bar Association to study the Code of Professional Responsibility, presented its proposed *Model Rules of Professional Conduct.* It recommended the repeal of the prohibition on maintenance, permitting the lawyer to advance expenses on the understanding that repayment is contingent: see American Bar Association Commission on Evaluation of Professional Standards, Discussion Draft, *Model Rules of Professional Conduct*, §1.9(e)(1), reprinted in 48 U.S.L.W. (Special Supp., Feb. 19, 1980). For commentary on these recommendations, see Findlater, "The Proposed Revision of DR 5-103(B): Champerty and Class Actions" (1981), 36 Bus. Law. 1667.

[177] See, generally, Harvard Developments, *supra*, note 111, at 1618-23.

[178] *Ibid.*, at 1622.

[179] Ethical Consideration 5-7 of the American Bar Association Code of Professional Responsibility justifies contingent fee agreements by the following argument:

> The possibility of an adverse effect upon the exercise of free judgment by a lawyer on behalf of his client during litigation generally makes it undesirable for the lawyer to acquire a proprietary interest in the cause of his client or otherwise to become financially interested in the outcome of the litigation .... Although a contingent fee arrangement gives a lawyer a financial interest in the outcome of the litigation, a reasonable contingent fee is permissible in civil cases because it may be the only means by which a layman can obtain the services of a lawyer of his choice. But a lawyer, because he is in a better position to evaluate a cause of action, should enter into a contingent fee arrangement only in those instances where the arrangement will be beneficial to the client.

payment of expenses, Disciplinary Rule 5-103(B) likely prevents the commencement of some actions, thereby effectively denying redress to prospective class members. Given the practical effect of this Rule, one might well contend that the same policy considerations argue in favour of suspending its operation in the class actions context.[180]

The prohibition on maintenance has precipitated litigation. Defendants, opposed by class representatives having monetary claims that would be dwarfed by the amount of the anticipated costs of the suit, have sought to use discovery procedures to reveal that their adversaries have meagre financial resources. In probing the financial situation of the class plaintiff, the defendant may have either or both of two possible objectives in mind, the realization of which will cause the putative class action to be refused certification. First, the defendant may strive to show that, due to an inability to pay the cost of notice and other expenses of the suit, the class plaintiff fails to satisfy the adequacy of representation prerequisite under Rule 23(a)(4). Secondly, the defendant may argue that, where the lawyer has advanced the expenses, the class representative's paucity of funds and assets renders the possibility of their reimbursement unlikely, if not wholly illusory, so that the lawyer has engaged in unethical maintenance of the class action. On that basis, it is contended that the lawyer has disqualified himself as an adequate representative of the class and, therefore, that certification should be denied.[181]

Attempts by defendants to obtain discovery of a class representative's financial resources have met with mixed results. For our purposes, it is unnecessary to review the relevant case law.[182] What is important is to realize that the ban on maintenance, if it were strictly observed by class lawyers or enforced rigorously by the courts or disciplinary committees of bar associations, would preclude almost all class actions. Requiring a class representative either to agree to pay the potentially enormous expenses of the suit, or actually to advance them, would create a formidable economic barrier to the assumption of that role. That class actions continue to be filed, including those in which the class plaintiff has a small potential recovery or one that is exceeded by the amount of the litigation expenses, suggests that, where advances have been made by class lawyers, reimbursement has not been

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The preliminary statement to the Code of Professional Responsibility explains that "Ethical Considerations are aspirational in character and represent the objectives toward which every member of the profession should strive. They constitute a body of principles upon which the lawyer can rely for guidance in many specific situations."

[180] The Committee on Professional Ethics of the American Bar Association has declared that the ban on maintenance applies in class action litigation: see American Bar Association, Committee on Professional Ethics, *Informal Opinion No. 1283* (November 20, 1973).

[181] See Bullock, *supra*, note 172, at 454-72; Note, "Class Certification: Relevance of Plaintiff's Finances and Fee Arrangements with Counsel" (1978), 40 U. Pitt. L. Rev. 70, at 73-81 (hereinafter referred to as "Relevance of Plaintiff's Finances"); and Harvard Developments, *supra*, note 111, at 1621, *n.* 176.

[182] See Bullock, *supra*, note 172, at 466-70; Harvard Developments, *supra*, note 111, at 1620, *n.* 176; and Relevance of Plaintiff's Finances, *supra*, note 181, at 76-81.

demanded if the suit fails.[183] In light of what appears to be the actual practice, several commentators have proposed that the ban on maintenance should be reconsidered in the context of class actions.[184]

(c) Conclusions

In the United States, due to the operation of the American rule, an award of attorneys' fees cannot be made against an unsuccessful litigant. Thus, the class representative will not be threatened with this kind of financial penalty in the event of the failure of the action. Moreover, since payment of lawyer's fees are usually contingent, whether rooted in a federal statute or the judicially-created common fund or substantial benefit doctrine, an unsuccessful litigant will not ordinarily be personally responsible for payment of his own lawyer for efforts undertaken on behalf of absent class members. If the class action is successful, the fees will be paid out of the recovery or by the defendant. If the suit is unsuccessful, the lawyer will not receive compensation, unless he has concluded agreements that he is to receive remuneration regardless of the outcome of the action.

In theory, the class representative, however, is not completely free of financial burdens that might discourage him from initiating a class action. If it were enforced or observed, the American Bar Association requirement that a client remain ultimately responsible for reimbursement of expenses advanced in litigation by his lawyer would impose an onerous burden on class plaintiffs that few could bear or, if they could, would choose to assume. We understand that, in practice, the prohibition is generally disregarded.

We have examined the experience in the United States in some detail because it is necessary to dispel some of the misunderstanding caused by the extreme nature of the American debate concerning class actions. The rhetoric suggests that, as a result of being permitted to conclude percentage contingent fee agreements with class representatives, lawyers are able with impunity to exact enormous fees out of all proportion to their efforts. Our study of the American law and practice has indicated that this is not the case.

4. PROPOSALS FOR REFORM IN OTHER JURISDICTIONS

In our earlier discussion of the present law in Ontario, we explained that the costs regime governing individual suits applies to class actions without

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[183] In "Developments: So-Called Legal Ethics" (1975), 4 C.A.R. 598, at 618, one commentator observed:

> Reimbursement is, of course, a pure fiction. Except perhaps where the class plaintiffs are business entities or others of substantial means, the unsuccessful class attorney's demand for payment just doesn't happen. The problem is that in explaining the duties of a class representative to his prospective client, the attorney cannot warn of the potential liability for costs while at the same time guaranteeing that he will never demand reimbursement for advances.

See, also, Relevance of Plaintiff's Finances, *supra*, note 181, at 91, and Findlater, *supra*, note 176, at 1672, *n.* 27.

[184] See Bullock, *supra*, note 172, at 473; Harvard Developments, *supra*, note 111, at 1618-23; "Developments: So-Called Legal Ethics" (1975), 4 C.A.R. 598, at 621; and Relevance of Plaintiff's Finances, *supra*, note 181, at 76-81.

any modification. Consequently, two financial risks must be borne personally by a class representative. The first risk is the payment of the party and party costs of the defendant. The second is the payment of the fees and disbursements of his own lawyer.

When we discussed the present law, we observed that, in view of the inevitable burden of paying the class lawyer and the possibility of an adverse award of party and party costs, economically rational individuals would not volunteer to be representative plaintiffs. Accordingly, we recommended that the present costs rules should not continue to apply to class actions.

A similar conclusion has been reached by the Law Reform Committee of South Australia, by Professor Neil Williams, and by the drafters of the Quebec class action legislation and the proposed federal competition legislation. While somewhat different solutions have been proposed, the consensus as to the necessity for fundamental change is striking. Even in the United States, where a very different costs regime generally facilitates the initiation of class actions, there have been recommendations for reform. Before we discuss the approach that we recommend for the proposed Ontario *Class Actions Act*, we shall describe the reform measures that have been enacted or proposed in other jurisdictions in order to indicate the range of alternatives that are available.

(a) The United States

In the United States, certain recommendations for reform of class action procedures have addressed the issue of attorneys' fees and litigation expenses. Although these suggestions for reform are presented against the background of a costs regime that differs from that of Ontario, we nevertheless find them germane to our deliberations. The proposals attempt to deal with fundamental issues that are relevant in Ontario – on whom should the burden of the class lawyer's fees and litigation expenses rest in class actions, and how should fees be calculated.

The Uniform Class Actions Act[185] contains several provisions relating to attorneys' fees, costs, and expenses. For example, section 17 addresses the practical problem caused by the application to class actions of the ethical rule against maintenance and the possible application of a rule against solicitation of contributions. While maintenance is prohibited in the United States, there is some controversy concerning whether it is proper for a class representative or his lawyer to solicit funds to defray the expenses of a class action, although the American Bar Association[186] and some courts[187] have sanctioned such

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[185] National Conference of Commissioners on Uniform State Laws, Uniform Class Actions Act, Uniform Laws Ann. (1975), Vol. 12 (Cum. Supp. 1981), at 20 (hereinafter referred to as "U.C.A.A."). The Uniform Class Actions Act has been adopted only in North Dakota and Iowa: see N.D. Cent. Code R. Civ. P. 23 and Iowa R. Civ. P. 42.1-.20 (1980), respectively.

[186] See *supra*, note 174.

[187] See *Norris v. Colonial Commercial Corp.*, 77 F.R.D. 672 (S.D. Ohio 1977), and *Coles v. Marsh*, 560 F.2d 186 (3d Cir. 1977), *cert.* denied 434 U.S. 985 (1977).

solicitation. Section 17 seeks to reverse the prohibition on maintenance and to resolve the controversy respecting solicitation. It gives the court power to authorize and supervise[188] the solicitation of contributions and the advancement of money by the lawyer to pay "costs and litigation expenses", subject to reimbursement from the class recovery. An order authorizing advances by the lawyer would appear to put the payment of expenses and costs on the same contingent basis as are fees.[189]

The Act effects a significant change in the present law by giving the court power to order the defendant to pay "reasonable attorney's fees and litigation expenses" to the class, but only where the class is successful in securing declaratory or equitable relief.[190] This discretion is exercisable "if permitted by law in similar cases not involving a class or the court finds that the judgment has vindicated an important public interest". The second of these prerequisites re-establishes the private attorney general doctrine; in doing so, it reverses the effect of the decision of the United States Supreme Court in *Alyeska Pipeline Service Co. v. Wilderness Society*,[191] which declared that, in the absence of express statutory authorization, courts lack the power to award attorneys' fees against defendants on the ground that an important public interest has been served by the litigation.

In addition to dealing with how, and by whom, attorneys' fees, costs, and expenses may be paid, the Act sets out a list of factors that the court must consider in assessing the amount of the attorney's fee.[192] Although most of these factors are taken from *Lindy Brothers Builders, Inc. v. American Radiator & Standard Sanitary Corp.*,[193] it should be observed that the court is not required to follow the step-by-step method of assessment established by *Lindy*.

In addition to effecting these changes, the Uniform Class Actions Act codifies aspects of the present law in the United States. It provides that, if there is an award of costs or fees against a class,[194] only the representative plaintiff and class members who have "appeared individually"[195] will be

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[188] This supervision is made manifest by U.C.C.A., *supra*, note 185, §17(a)(1), which requires the class representative and the class lawyer to file with the court "a statement showing any amount paid or promised them by any person for the services rendered or to be rendered in connection with the action or for the costs and expenses of the litigation and the source of all of the amounts".

[189] See *supra*, this ch., sec. 3(a)(i).

[190] U.C.A.A., *supra*, note 185, §16(d).

[191] *Supra*, note 81. See discussion *supra*, this ch., sec. 3(a)(i).

[192] U.C.A.A., *supra*, note 185, §16(e).

[193] *Supra*, note 122. See discussion *supra*, this ch., sec. 3(a)(i).

[194] A court may award attorneys' fees to a successful defendant under the bad faith or statutory exceptions to the American rule.

[195] Post-certification notice must inform the class that any class member may enter an appearance or intervene: see U.C.A.A., *supra*, note 185, §§7(b)(6) and 9(a)(3).

liable.[196] Finally, it codifies the common fund doctrine and declares that attorneys' fees are subject to judicial control.[197]

Each of the class action procedures proposed by the Office for Improvements in the Administration of Justice (O.I.A.J.) of the United States Department of Justice has addressed the issue of attorneys' fees, costs, and expenses.[198] As we have explained,[199] these proposals create a two-tier class action procedure in which claims arising out of a mass wrong are treated differently, depending upon whether the damage suffered by each person amounts to more or less than $300. Unless otherwise indicated, the following discussion will outline the approach of the more recent proposal, Bill H.R. 5103.

Generally speaking,[200] claims for $300 or less may be asserted only by means of a "public action" brought in the name of the United States by either the Attorney General or an agency of the United States government or "on relation" by a private citizen who has been injured.[201] In the case of an action brought on relation, it may be taken over or "assumed" by the United States, a federal agency, or a state.[202] If the defendant is found liable, the judgment will require the payment of a global amount, known as a "public recovery", which is to be distributed "in a reasonably accurate manner without requiring submission of claims".[203] The primary purposes of a public action are to prevent unjust enrichment and to deter illegal conduct. Claims in excess of $300 may be asserted by means of a "class compensatory action" brought on behalf of injured persons; the primary purpose of this action is to compensate the victims of a mass wrong.

Public actions and class compensatory actions are governed by separate rules respecting fees and litigation expenses. In public actions, different rules apply according to whether the action has been brought by a relator or has been assumed by the United States, a federal agency, or a state.

Where the United States is successful in, or settles, a public action that

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[196] *Ibid.*, §§14(a) and 16(b).

[197] *Ibid.*, §16(a) and (c). It should be observed, however, that the substantial benefit doctrine has not been covered by the Act.

[198] A Bill To provide for the reform of class action litigation procedures, United States Department of Justice, Office for Improvements in the Administration of Justice, Bill S. 3475, 95th Cong., 2d Sess. (1978) (hereinafter referred to as "O.I.A.J. Bill S. 3475"), and Small Business Judicial Access Act of 1979, United States Department of Justice, Office for Improvements in the Administration of Justice, Bill H.R. 5103, 96th Cong., 1st Sess. (1979) (hereinafter referred to as "O.I.A.J. Bill H.R. 5103").

[199] See *supra*, ch. 6, sec. 1(a)(iv).

[200] O.I.A.J. Bill H.R. 5103, *supra*, note 198, §3001(a)(2).

[201] O.I.A.J. Bill H.R. 5103, *supra*, note 198, §3001(c). See, also, O.I.A.J. Bill S. 3475, *supra*, note 198, §3001(c).

[202] O.I.A.J. Bill H.R. 5103, *supra*, note 198, §3002(b). See, also, O.I.A.J. Bill S. 3475, *supra*, note 198, §3002(b).

[203] O.I.A.J. Bill H.R. 5103, *supra*, note 198, §3005(b). See, also, O.I.A.J. Bill S. 3475, *supra*, note 198, §3007(b).

was initiated by a relator, Bill H.R. 5103 provides for a "one way" rule that requires the defendant to pay to the relator, in addition to the public recovery, "taxable costs and reasonable litigation expenses . . . including attorney's fees, if such fees are otherwise allowed by law".[204] By providing that attorneys' fees are to be awarded "if . . . otherwise allowed by law", the Bill does not alter the existing law which, since the *Alyeska* case, has provided that it is the province of Congress to determine where it is appropriate to abrogate the American rule that attorneys' fees ordinarily are not recoverable from an unsuccessful party. New ground is broken, however, by providing that, in the event of a settlement, fees, costs, and expenses must be paid in addition to the settlement fund.[205] Allowing the relator to recoup these amounts will reimburse him for the expense incurred to vindicate what is deemed to be a right of the United States. Were these funds unavailable, it is unlikely that any person would choose to initiate a public action.

In addition to providing for payment of expenses, costs, and attorneys' fees, the Bill requires an unsuccessful defendant to pay a relator "an incentive fee", "unless the relator substantially relied upon a judgment, upon the product of a civil action, or upon the product of an investigation, grand jury proceeding or criminal prosecution conducted by a State or by the United States".[206] This fee, which is distinct from attorneys' fees, must be paid directly to the relator and cannot be paid to his lawyer. If the court finds that someone other than the relator has "measurably advanced the effective prosecution of the action", it may award to that person costs and reasonable litigation expenses, including attorneys' fees and a portion of the incentive fee.

The institution of an incentive fee was intended to facilitate the achievement of the underlying policy objectives of the public action. In view of the goals of deterring unlawful conduct and preventing unjust enrichment by means of private law enforcement, it was thought necessary to provide an inducement to encourage individuals to become actively involved in litigation.[207]

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[204] O.I.A.J. Bill H.R. 5103, *supra*, note 198, §3003(a)(1). See, also, O.I.A.J. Bill S. 3475, *supra*, note 198, §3005(a)(1).

[205] See United States Department of Justice, Office for Improvements in the Administration of Justice, *Bill Commentary: The Case for Comprehensive Revision of Federal Class Damage Procedure*" (July 25, 1979), at 40-41, *n.* 143 (hereinafter referred to as "Commentary to Bill H.R. 5103").

[206] O.I.A.J. Bill H.R. 5103, *supra*, note 198, §3003(a)(2). The incentive fee is equal to 20% of the first $25,000 of the public recovery, plus 10% of the next $50,000 of the public recovery. See, also, O.I.A.J. Bill S. 3475, *supra*, note 198, §3005(a)(2).

[207] In Commentary to Bill H.R. 5103, *supra*, note 205, at 40, the purpose of the incentive fee is explained as follows (footnotes omitted):

> Section 3003(a)(2) provides a modest, direct monetary incentive for injured persons to detect and report violations of federal law. A major purpose of the procedure is to create incentives that run not only to attorneys and encourage action by injured persons, those best able to detect violations. An active, informed citizenry is the best means to assure that there is widespread compliance with the law without the creation of a massive new bureaucracy. At present, persons with small injuries have little incentive to contribute to litigation on their behalf.

Where control of a public action has been assumed by the United States, a state, or a governmental agency, "expenses found by the court in its discretion to be reasonable", including attorneys' fees, are to be paid by the United States Department of Justice, the state, or agency to a relator who the court has found "measurably advanced the initiation of the action".[208] Expenses include those incurred prior to the commencement of the action and up to the date the action was assumed. An unsuccessful defendant must reimburse the Department of Justice, the state, or the agency for the amounts so paid.[209]

Under Bill H.R. 5103, in both class compensatory and public actions, attorneys' fees must be determined at a separate fee hearing. At such hearings, the advice of a magistrate or a special master may be sought by the court.[210]

The predecessor to Bill H.R. 5103, Bill S. 3475, included section 3027, a very detailed provision governing the calculation of attorneys' fees in both class compensatory actions and public actions. The decision to omit this provision from O.I.A.J. Bill H.R. 5103 is not explained in the Commentary that accompanies that Bill.

Without question, section 3027 is the most detailed provision respecting the calculation of a class lawyer's fee that we have seen in our study of various class action procedures. It resembles the *Lindy* approach, with the addition of several features. An interesting facet of section 3027 is that it stipulates maximum and minimum limits on the amount by which a lawyer's hourly fee can be multiplied to compensate him for the risk assumed in conducting the action on a contingent basis. This adjustment, however, reflectes only the risk factor, but not the quality of work. In this respect, section 3027 differes from the *Lindy* approach, which adjusts the "lodestar" to account for both factors. It was thought that an adjustment in respect of "quality and ability of counsel" was improper, since these elements would be reflected in the lawyer's hourly rate.[211]

A final aspect of section 3027 is that it attempts to prevent a lawyer from obtaining a fee that exceeds the amount determined to be appropriate under it. For example, the lawyer may have concluded contingent fee agreements with individual class members. In order to ensure that the amount calculated under section 3027 was the total compensation received by the class lawyer

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[208] O.I.A.J. Bill H.R. 5103, *supra*, note 198, §3003(b)(1)(A).

[209] *Ibid.*, §3003(b)(2).

[210] *Ibid.*, §3026(c).

[211] See United States Department of Justice, Office for Improvements in the Administration of Justice, *S. 3475 - Bill Commentary: Proposed Revisions in Federal Class Damage Procedures* (August 25, 1978), at 64. The drafters appeared to interpret the "quality of work" adjustment required by the *Lindy* approach to refer to the general ability of the class lawyer. However, the purpose of the fee adjustment is to take account of the ability demonstrated by the lawyer in the particular class action in respect of which fees are being sought. In *Lindy II*, Aldisert J., speaking for the Court, explained that the "quality of work" factor was not intended to reflect the skill of the applying lawyer "in a general sense": see *supra*, note 133.

from all sources, the court was enjoined to reduce the fee award by any excess over that amount. Furthermore, the court was given an additional discretion to reduce the fee award if it found the amount "unreasonably large relative to the size of recovery, if any".[212]

(b) Quebec

The Quebec class actions statute[213] has addressed the problem of solicitor and client costs, but has left the normal "two way" party and party costs rule intact.[214] The legislation has created a government agency, the "Fonds d'aide aux recours collectifs" (hereinafter referred to as the "Fonds"),[215] to provide financial assistance to class representatives in order to defray the cost of paying the class lawyer and the litigation expenses incurred in a class action. Assistance does not extend, however, to the party and party costs payable to the defendant by an unsuccessful representative plaintiff.

The decision to institute a scheme of government financial aid was based on a view that a prospective class plaintiff, faced with the responsibility of paying lawyers' fees, the cost of notice, and other expenses, would be unlikely to invoke the procedure. Because class actions could benefit many injured persons, it was believed to be appropriate for the state to assume the financial burden that otherwise would be cast on a representative plaintiff.[216]

Under the Quebec scheme, every representative plaintiff, and any person who seeks to become a representative plaintiff, may apply in writing for financial assistance from the Fonds.[217] Aid may be sought for the payment of lawyers' fees, experts' fees, court costs, including the costs of notice, and "the

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[212] O.I.A.J. Bill S. 3475, *supra*, note 198, §3027(e).

[213] *An Act respecting the class action*, S.Q. 1978, c. 8 (hereinafter referred to as "Quebec Act"). See discussion, *supra*, ch. 2, sec. 2(f).

[214] Article 477 of the *Code of Civil Procedure*, R.S.Q. 1977, c. C-25 (hereinafter referred to as "C.C.P."), provides as follows:

> 477. The losing party must pay all costs, including the costs of the stenographer, unless by decision giving reasons the court reduces or compensates them, or orders otherwise . . . .

[215] The Fonds is a corporation politically responsible to the Minister of Justice to whom it must send an annual report, which he must table before the National Assembly. At any time, the Minister may require the Fonds to provide any information or report concerning its activities. Fiscal accountability is ensured by rendering the Fonds subject to audit by the Auditor-General on an annual basis or whenever ordered by the Government: see Quebec Act, *supra*, note 213, ss. 17, 18, and 19.

[216] See Fonds d'aide aux recours collectifs, *Rapport Annuel 1979-80* (1980), at 11 (hereinafter referred to as "Rapport Annuel").

[217] Quebec Act, *supra*, note 213, s. 20. Section 21 requires the applicant to set out "the basis of his claim and the essential facts determining its exercise" and to "describe the group on behalf of which he intends to bring or is bringing the class action". The applicant must state his or her financial condition, the purposes for which assistance is sought, the amount required, and whether other revenue is available.

other expenses expedient to the preparation or the bringing of the class action".[218] On receipt of an application, the Fonds must determine entitlement to aid having regard to "whether the class action may be brought or continued without such assistance".[219] If a class action has not yet been authorized, the Fonds must consider whether it is probable that there is a valid cause of action and the probability that the class action will be brought. In essence, the former factor amounts to a form of preliminary assessment of the merits of the class action.

Where there is a decision to provide assistance to an applicant, the conditions of such assistance must be set out in an agreement between the Fonds and the recipient.[220] The respective obligations of the recipient and the Fonds are established by this agreement and by the provisions of the Act.[221]

The Quebec legislation provides that, if the class representative or his lawyer receives amounts as fees, costs, or expenses from a third party, these amounts must be reimbursed to the Fonds to the extent of the financial assistance granted.[222] In a successful class action, as a result of the normal "two way" costs rule, this would require a class representative to remit the appropriate amount of party and party costs to the Fonds. It would not appear, however, that the Fonds is entitled to recover the amount of financial assistance directly from the individual recoveries of the representative plaintiff or the class members. Consequently, if the amount granted exceeds the party and party costs paid by the defendant, the amount of the discrepancy between solicitor and client costs and party and party costs would be borne by the Fonds.[223]

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[218] *Ibid.*, s. 29(*d*).

[219] *Ibid.*, s. 23. For a discussion of how the administrators of the Fonds have exercised their discretion, see Rapport Annuel, *supra*, note 216, at 12-13. The Fonds has a discretion to order a hearing for the purpose of deciding an application for assistance.

[220] Quebec Act, *supra*, note 213, ss. 25, 27, and 28.

[221] For example, a person is obliged to repay the Fonds if he fails to bring the class action, or does not receive authorization to bring it, or if he waives or loses the status of class representative. In addition, if the moneys are used for purposes other than those agreed upon, the amount of assistance that is not used for the purposes of the class action must be reimbursed: see *ibid.*, ss. 33 and 34.

[222] *Ibid.*, s. 30. Section 25(*g*) provides that the agreement between the recipient and the Fonds must stipulate for "the subrogation of the Fonds in the rights of the recipient or his attorney up to the amounts paid to them". This contractual provision would implement the statutory right of the Fonds to be reimbursed from an award of party and party costs.

[223] Article 1035 of the C.C.P., *supra*, note 214, as enacted by S.Q. 1978, c. 8, s. 3, provides that, in the case of a collective recovery – that is, an aggregate assessment – the following scheme of distribution is to be followed:

> 1035. The claims are collocated in the following order:
>
> 1. law costs, including the costs of notification;
>
> 2. the fees of the representative's attorney; and
>
> 3. the claims of the members, if any.

It is unclear whether this article would authorize the Fonds to claim reimbursement

If the Fonds refuses an application for assistance, the applicant may appeal to the Provincial Court[224] by a motion brought within fifteen days of the decision.[225] There is no further appeal from the determination of the Provincial Court.[226]

Moneys for the Fonds are to be granted annually by the Quebec National Assembly.[227] A sum of $100,000 was appropriated for the first year of operation, based on an estimate by the Quebec Ministry of Justice that approximately 580 class actions would be filed each year, of which the Ministry believed some twenty percent (110 to 120) would receive authorization. Of these class actions, it was predicted that sixty percent (66 to 72) would include applications for financial assistance. Twenty percent (12 to 14) of these applications could be expected to be successful. The Ministry of Justice expected that the costs of a class action would range from $1,000 to $15,000 and anticipated that, on the average, the Fonds would contribute seventy-five percent of the costs.[228]

Measured against the expectation that approximately 580 class actions would be initiated annually under the new legislation, relatively few motions for authorization to institute a class action have been presented. As we noted earlier,[229] in the period beginning January 19, 1979, when the statute came into force, until February 2, 1982, only seventy-seven motions were filed. While several reasons, such as unfamiliarity with novel legislation, have been suggested to account for the failure to resort to the new procedure,[230] it appears that one factor is particularly significant and deserves special mention.

We have observed that the normal party and party costs rule of civil litigation applies to class actions in Quebec and that financial assistance to an unsuccessful plaintiff is unavailable in respect of these costs. The deterrent effect of this rule is exacerbated by the possible application of article 23[231] of

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from a collective recovery. Its subrogation right is in respect of amounts received as party and party costs (see *supra*, note 222), but does not appear to extend to amounts received as shares of that recovery by class members.

[224] Title II of the C.C.P., *supra*, note 214, arts. 34-36, deals with the courts of Quebec. It establishes and delimits the jurisdiction of the Court of Appeal, the Superior Court, the Provincial Court, and the municipal courts.

[225] Quebec Act, *supra*, note 213, s. 35.

[226] *Ibid.*, s. 37.

[227] *Ibid.*, s. 45.

[228] See Sirois, "Un fonds d'aide de 100,000 dollars" (1979), 1 Justice 22. An interesting and somewhat curious aspect of the Quebec legislation is that it requires the Fonds to withhold a percentage fixed by regulation from any undistributed balance of a collective recovery or from a claim that is individually assessed. While it might be expected that the money collected would be appropriated by the Fonds, that is not the case. The Fonds is obliged to pay the sums withheld by it into the Consolidated Revenue Fund: see Quebec Act, *supra*, note 213, ss. 42 and 44.

[229] See *supra*, ch. 2, sec. 2(f).

[230] See Rapport Annuel, *supra*, note 216, at 6-7.

[231] O.C. 2067-76, (1976) 108 O.G. II, 3991.

the Tariff of Judicial Fees[232] established by the General Council of the Barreau du Québec.[233] It provides that, in actions where the amount in dispute exceeds $100,000, an additional taxable fee of one percent of the excess must be paid to the successful party by his adversary. A recent decision of the Quebec Superior Court has held that article 23 does not apply to an unsuccessful motion for authorization.[234] However, it appears that it would apply to a class action that failed at trial, in which case a daunting threat would face anyone contemplating class litigation.

(c) Proposed Canadian Competition Legislation

Successive drafts of the proposed Canadian competition legislation, Bill C-42[235] and Bill C-13,[236] take the same approach to costs. With respect to party and party costs, a general "no way" costs rule is instituted. However, this rule is subject to exceptions: costs may be awarded on the application for an order that the proceedings be maintained as a class action, in individual proceedings, and on interlocutory motions.[237] In addition, each Bill provides that, in proceedings to determine individual questions, class members and the defendant "are subject to the same liability for costs as in an ordinary civil action".[238]

In addressing the issue of solicitor and client costs, Bill C-42 provides as follows:[239]

> 39.2.-(2) Where, in a class action, judgment is given in favour of the members of the class, the reasonable solicitor and client costs of the member or members of the class who commenced the proceedings, including costs of any appeal, as determined by the Court that ordered the proceedings to be maintained as a class action or by the court hearing the appeal, as the case may be, constitute a first charge, on a *pro rata* basis, against amounts ordered to be paid, as compensations for loss or damage suffered, to members of the class in the proceedings or in any subsequent proceedings arising out of the class action.

This statutory charge is effective assurance that the representative plaintiff

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[232] "Extrajudicial fees" are defined in s. 1 of *An Act respecting the Barreau du Québec*, R.S.Q. 1977, c. B-1, as "fees or costs, whether provided for in the tariff or not, which an advocate may charge for professional services or in addition to judicial costs, and which arise from the practice of the profession of advocate". Judicial costs, by contrast, are defined as "costs provided for in the tariff, and taxable by the competent officer of the court".

[233] *Ibid.*, s. 125(2).

[234] *Association Pour la Protection Automobile -c.- Canadian Honda Motor Ltd.*, M. le Juge Charles Phelan, C.S. (Montréal) le 23 septembre 1981, (500-06-00010-799).

[235] Bill C-42, *supra*, note 65.

[236] Bill C-13, *supra*, note 65.

[237] Bill C-42, *supra*, note 65, s. 39.2(1), and Bill C-13, *supra*, note 65, s. 39.18(1).

[238] Bill C-42, *supra*, note 65, s. 39.21(*a*), and Bill C-13, *supra*, note 65, s. 39.19(*a*).

[239] Bill C-42, *supra*, note 65, s. 39.2(2). See, also, Bill C-13, *supra*, note 65, s. 39.18(2), which is virtually identical.

will be compensated for the solicitor and client costs payable to the class lawyer from the amounts recovered for the class. A provision such as this would cure the problem under the present law that, in a successful suit, the representative plaintiff must bear some personal liability because an award of party and party costs is only a partial indemnity.

Notwithstanding that these changes would facilitate class actions, it should be emphasized that the representative plaintiff would remain personally responsible for solicitor and client costs in the event of an unsuccessful class action, unless other class members have agreed to share this burden. Consequently, some disincentive to the initiation of a class action would remain under the proposed competition legislation.[240]

(d) South Australia

In the Draft Bill for a Class Actions Act proposed by the Law Reform Committee of South Australia,[241] there is a comprehensive attempt to address the two burdens imposed on a representative plaintiff by the present costs rules. The spectre of an adverse party and party costs award is removed by the replacement of the "two way" costs rule with a "one way" rule. Under this "one way" rule, subject to limited exceptions, party and party costs cannot be awarded to successful defendants. Party and party costs can be awarded in favour of a defendant only on an application for an order that the action is to be maintained as a class action, on the determination of a claim of an individual class member, on an interlocutory application made necessary by a default or an unreasonable act or omission by the plaintiff, or if the order to maintain the action as a class action was obtained by the fraud or perjury of the plaintiff.[242] In addition, the Draft Bill provides that, in proceedings to determine the claim of an individual class member, the class member and the defendant are "subject to the same liability for costs as the parties in an ordinary action in the Court".[243]

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[240] The approach to costs followed in the competition legislation has been criticized in Prichard and Trebilcock, "Class Actions and Private Law Enforcement" (1978), 27 U.N.B. L.J. 5, at 14-15:

> This proposal, while well-intentioned, fails to grasp fully the risks faced by a class representative and his lawyer. Under the proposal, if the suit succeeds, the lawyer is assured reasonable solicitor and client costs from the class for his services with respect to that suit. But if the suit fails, the lawyer is not entitled to receive his fees from the other side, and can only look to the class representative for payment. Few class representatives will accept this risk. Understandably, few lawyers will accept the risk of non-payment in this event. Given the complicated and time-consuming nature of most class actions, and the uncertain outcome of such actions in areas of complex economic regulation such as competition policy, the risk of failure, whoever *de facto* bears it – class representative or lawyer – will deter most suits.

[241] Law Reform Committee of South Australia, "Draft Bill for a Class Actions Act", in *Thirty-sixth Report Relating to Class Actions* (1977), at 12 (hereinafter referred to as "South Australia Draft Bill").

[242] *Ibid.*, s. 11.

[243] *Ibid.*, s. 9(5).

The Law Reform Committee of South Australia was of the view that, while a "one way" costs rule would remove one deterrent to a prospective class plaintiff, in order to make the procedure available, further modifications were necessary through the implementation of special rules to govern the payment of the class lawyer. The Committee stated as follows:[244]

> While this recommendation [that is, for a general 'one way' costs rule to govern class actions] relieves the representative plaintiff of the risk of having to pay the defendant's costs if unsuccessful, it does not provide the means by which he can launch and prosecute the action on behalf of the class. The representative plaintiff cannot be expected to provide out of his own resources the funds to enable the action to proceed for the benefit of the members of the class. The solicitor retained by the representative plaintiff cannot look to members of the class who have not instructed him. A solicitor cannot be expected to finance the litigation on the basis that he will obtain his fees and out of pocket expenses if the action succeeds but will bear them himself if the action fails . . . . It seems to us that some special scheme for the remuneration of the plaintiff's solicitor (and counsel if retained) is required if class actions are to be a useful remedy for ordinary people. The circumstances in which class actions will be brought will be so variable that we think a considerable degree of flexibility is necessary and that the approval of an appropriate scheme must be left to the Judge who makes the order for the action to proceed as a class action.

The issue of a class representative's responsibility for the payment of solicitor and client costs is attacked in the South Australia Draft Bill in two different ways. First, there is a mandatory requirement that the certification order "contain a [judicially approved] scheme for the payment of the fees and out of pocket expenses of the plaintiff's solicitors".[245] Among the provisions that the scheme may include are the following:[246]

(*a*) that the plaintiff or his solicitor be paid out of the fruits of the action, in accordance with a scheme approved by the Judge, the excess of the solicitor and client costs over any costs recovered from the defendant;

(*b*) that the solicitor for the plaintiff, in consideration of foregoing his right to be paid his costs by the plaintiff, be paid out of the fruits of the litigation or by the defendant, in accordance with a scheme approved by the Judge, a sum, in excess of solicitor and client costs, determined by the Court as fair and reasonable compensation to the solicitor for the risk of loss incurred by him in undertaking the conduct of the action;

(*c*) that the question of payment or recoupment of the plaintiff's costs be reserved to the trial Judge with power to that Judge to make an order including any of the above provisions and such other provisions as he deems just and expedient;

(*d*) that the solicitor for the plaintiff have a first charge for his costs on the fruits of the litigation.

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[244] South Australia Report, *supra*, note 64, at 8.

[245] South Australia Draft Bill, *supra*, note 241, s. 3(7).

[246] *Ibid.*, s. 3(8).

Although this scheme goes a considerable distance towards removing disincentives to class litigation, we observe that, under the South Australia Draft Bill, a class representative will be unsure of the extent of his ultimate liability until the conclusion of the hearing of the application to maintain the action as a class action. In our view, this is a serious deficiency. We believe that a prospective representative plaintiff should know and understand the conditions under which he will be proceeding when he contemplates the commencement of a class action. Otherwise, the uncertainty respecting his potential financial exposure would in itself constitute a deterrent.

Alternative (*a*) – payment from the recovery of the difference between solicitor and client costs and the award of party and party costs – relieves the representative plaintiff of the financial burden of paying the class lawyer where the action is successful. Where the suit fails, however, the class representative remains personally responsible for satisfying the solicitor-client bill. Alternative (*d*), which gives the lawyer a statutory charge for his costs on the class recovery, also suffers from this disadvantage.

Alternative (*b*) allows the court to approve a form of contingency arrangement, whereby the representative plaintiff is absolved from the personal responsibility of paying the class lawyer: in return for foregoing payment for his costs in an unsuccessful action, the lawyer will be paid a sum, either by the defendant or from the recovery, that compensates him for the financial risk incurred in prosecuting the suit on a contingent basis. If the court were to approve such a scheme, the representative plaintiff would be free of a costs burden, regardless of the outcome of the action.

Alternative (*c*), permitting the question of costs to be deferred for the decision of the trial judge, accentuates the uncertainty that we have criticized as being an undesirable characteristic of the general approach taken to solicitor and client costs. If the matter of costs were left to be determined at trial, a representative plaintiff, unsure whether he would be personally obliged to pay his lawyer, might abandon a class action, even though it has received the requisite judicial approval.

The second measure directed to the problem of the class plaintiff's responsibility for paying solicitor and client costs is the creation of "The Class Action Indemnity Fund",[247] which is to perform a subsidiary role in relieving this burden. Financial assistance may be given to a class representative if he is unable to arrange for payment on a contingent basis.[248]

The Fund has two other purposes which are not related to this particular issue. The second function of the Fund is to serve as a source of payment for the costs of successful defendants who, under the Draft Bill, are precluded from recovering them by the general prohibition against awarding party and party costs to defendants. By allowing the defendant to recover costs from the Fund, the otherwise uneven treatment of the general "one way" costs rule is ameliorated. The Bill provides that costs may be paid to defendants "in proper cases", but affords no guidance respecting this matter.[249]

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[247] *Ibid.*, s. 10(7).

[248] *Ibid.*, s. 10(7)(ii)(*a*).

[249] *Ibid.*, s. 10(7)(ii)(*b*).

The third purpose of the Fund is "the alleviation of any hardship caused to class members by defaults or defalcations of a representative or his agents".[250] Presumably, this is intended to deal with a situation where a class representative who has solicited contributions from class members has misappropriated funds, leaving the class without sufficient resources to continue the prosecution of the class action.

The South Australia Draft Bill provides that the moneys for the Fund may be supplied from the undistributed residue of aggregate assessments. If a balance of an aggregate award remains after reasonable efforts have been made to locate class members, the representative plaintiff must apply to the court for directions as to the application of the money. A copy of this application must be served on the Attorney-General,[251] who may intervene and may either propose a scheme for the benefit of some or all members of the class[252] or recommend payment to the Class Action Indemnity Fund. The court has a discretion whether to approve the Attorney-General's proposal. If the Attorney-General fails to intervene or if the court does not approve the proposed scheme or payment, the court may order that the undistributed residue be returned to the defendant or paid into the Indemnity Fund or applied against the costs and expenses of the class action.[253]

Finally, we note that the South Australia Draft Bill gives the court a residual discretion to give directions "for the purpose of doing justice as between the members of the class". It expressly provides that a court may give directions to defray the costs and expenses of doing anything required to be done under the Act, and that all or part of these costs and expenses may be deducted from the undistributed balance of an aggregate award.[254] Conferring such a discretion on the court is evidence of the importance placed by the Law Reform Committee of South Australia on removing financial burdens from the shoulders of the representative plaintiff.

(e) Proposals by Professor Neil Williams

In his Model Consumer Class Actions Act[255] and combines proposal,[256] Professor Neil Williams recommends that the existing "two way" costs rule be replaced by a "one way" rule under which costs cannot be awarded to the defendant, except on the application for an order that the action be maintained as a class action, proceedings to determine individual claims, and on

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[250] *Ibid.*, s. 10(7)(ii)(*c*).

[251] *Ibid.*, s. 10(5).

[252] See discussion of this type of distribution *supra*, ch. 14, sec. 3(c)(v).

[253] South Australia Draft Bill, *supra*, note 241, s. 10(6). See, also, South Australia Report, *supra*, note 64, at 10.

[254] South Australia Draft Bill, *supra*, note 241, s. 12.

[255] Williams, "Model Consumer Class Actions Act", in "Consumer Class Actions in Canada – Some Proposals for Reform" (1975), 13 Osgoode Hall L.J. 1, at 65, s. 11 (hereinafter referred to as "Williams' Model Act").

[256] Williams Combines Class Actions, *supra*, note 61.

interlocutory motions. More specifically, in individual proceedings, class members and the defendant are "subject to the same liability for costs as the parties in an ordinary action in the court".[257]

Moreover, in the Model Consumer Class Actions Act, costs awarded to a class representative are to constitute a full indemnity for solicitor and client costs, unless otherwise ordered by the court.[258] Where an aggregate assessment has been ordered, the court has a discretion to relieve the defendant of the whole or part of these costs by deducting them from the aggregate award.[259] In the exercise of this discretion, the court, for example, could order the defendant to pay the costs on a party and party scale and could direct payment from the aggregate fund of the difference between this amount and the amount of solicitor and client costs. In a sense, by conferring this discretion, the "one way" costs rule conceivably could be converted into a "no way" rule by the court.

Like Bill C-42 and Bill C-13, the Model Consumer Class Actions Act provides only a partial solution to the problem of a representative plaintiff's responsibility for paying the class lawyer. By providing that, in a successful class action, costs ordinarily are to be paid by the defendant "on the basis of solicitor and own client", all of the class lawyer's fees and disbursements will be indemnified by an award of party and party costs. Thus, there will be no deficiency for which the class representative otherwise will be personally liable to the lawyer. The Model Act, however, fails to address the possible liability of the class plaintiff for solicitor and client costs in the event of an unsuccessful action. According to the present law, in the absence of agreements with class members, a class representative will bear sole responsibility for payment of the class lawyer's bill.

In his combines proposal, Professor Williams addresses this problem. In addition to a "one way" costs rule, he recommends that a class lawyer and a class representative should be permitted to enter into a form of contingent agreement that stipulates for payment only in the event of success in the action.[260] If such an agreement were concluded, the financial risk inherent in failure would be transferred from the class representative to the lawyer. In conjunction with the proposed "one way" costs rule, this would remove all financial risks respecting costs from the shoulders of the representative plaintiff. It should be observed that, under the combines proposal, a contingent fee agreement cannot stipulate that the amount of the fee is to be a percentage of the recovery.[261] Instead, the amount is to be determined by the court.[262] In calculating the fee, the court must take into consideration the fact

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[257] Williams' Model Act, *supra*, note 255, s. 9(5).

[258] *Ibid.*, s. 11(3)(a).

[259] *Ibid.*, s. 11(3)(b).

[260] Williams Combines Class Actions, *supra*, note 61, s. 39.10.

[261] *Ibid.*, s. 39.10(3).

[262] Where a contingent agreement is made, a copy must be filed in the court and served on the defendant: see *ibid.*, s. 39.10(4).

that the class lawyer will be entitled to remuneration for his services only in the event of success, as well as any other matter thought to be relevant.[263]

5. THE PROPOSED COSTS REGIME

In an earlier section of this chapter, we contended that the application of the existing Ontario costs rules to class actions has resulted, and will continue to result, in the commencement of very few class actions. These rules involve substantial financial risks, that is, liability for party and party costs and solicitor and client costs. Because, in the absence of agreement with other class members, these risks must be borne personally by the representative plaintiff, they will discourage economically rational individuals from assuming this responsibility. As a consequence, it was the unanimous recommendation of this Commission that the proposed *Class Actions Act* should not be governed by the present costs rules applicable to individual actions.

The Commission is divided on the matter of what rules should replace the existing regime. While one Commissioner favours legislation expressly leaving the entire question of costs to be decided by the trial judge, the majority recommends the costs scheme that we shall describe in the balance of this chapter.

In designing a special costs regime for class actions, the Commission has been guided by two principles. First, we believe that the costs disincentives attributable to the fact that the action is proceeding in class, rather than in individual, form should be removed. Secondly, it is our view that we should strive to effect changes involving the least possible disruption to the principle of equality of treatment of parties that underlies the existing Ontario costs rules. Whatever costs rules are to be implemented should be fair to all participants in class litigation. In particular, since the purpose of our proposals is to facilitate meritorious class actions, there is a concern that the costs rules not prejudice defendants.

In applying these principles to the class action procedure that we have proposed, it is our conclusion that the certification and common questions stages of a class action should be governed by a different set of costs rules from that which should apply to proceedings to determine individual questions. The costs rules at the certification and common questions stages are intended to remove the costs disincentives caused by the action proceeding as a class action. As we shall explain later,[264] at the stage when the individual issues are to be determined, this rationale, which justifies abrogation of the normal Ontario costs rules, no longer applies, so that, subject to minor modifications, the usual rules should govern.

We now turn to consider how the proposed *Class Actions Act* should treat the two inherent financial risks – liability for party and party costs and

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[263] *Ibid.*, s. 39.12. For the policy discussion in support of the recommendation in favour of allowing this form of contingent arrangement, see Williams Combines Class Actions, *supra*, note 61, at 76-107.

[264] See discussion, *infra*, this ch., sec. 5(c).

solicitor and client costs – that now deter persons from becoming class representatives.

(a) Party and Party Costs

We believe that, irrespective of the amount of his potential personal recovery, an individual will be deterred from initiating a class action by the risk that party and party costs will be awarded against him in an unsuccessful action.[265] Accordingly, we recommend that the ordinary party and party costs rule should be abrogated and replaced by a general rule that, at the certification hearing and the common questions stage of a class action, no party and party costs may be awarded to either party.[266]

In making this proposal, we draw support from the fact that, except for the Quebec class actions legislation, the class action procedures that have been proposed in Canada and South Australia provide expressly that party and party costs cannot be awarded against a class representative on the determination of the questions common to the class. In the United States, while an unsuccessful litigant may be liable for "costs", under the so-called "American rule" he cannot be required to pay the more formidable expense of the attorneys' fees of his adversary, except to the extent sanctioned by federal statute.[267]

The suggestion that the party and party costs rule should be reconsidered in this Province was made by the Osler Task Force on Legal Aid in 1974.[268] Strictly speaking, the general issue of costs was not within the mandate of the Task Force. However, when the problem of granting legal aid to groups was considered, it was thought appropriate to comment generally about the impact of party and party costs. The Task Force expressed the view that the "two way" costs rule deters group litigation to enforce "statutory or common law rights" where those contemplating litigation do not possess a "particular or private individual interest". Consequently, an amendment to *The Legal Aid Act*[269] was recommended to provide that, if actions raising such issues failed, before a successful defendant could recover costs, he would have to demonstrate that "no public issue of substance was involved in the litigation or that the proceedings were frivolous or vexatious".[270]

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[265] In the case of individually nonrecoverable claims, the amount of his own recovery often will be exceeded by the potential liability for party and party costs. Even where the class plaintiff possesses an individually recoverable claim, he would be effectively discouraged from bringing a class action. By definition, his claim exceeds his potential costs by a sufficient margin to permit him to prosecute an individual action; accordingly, under the present costs regime, he would be better advised to bring an individual action than to incur the greater expense of a class action.

[266] See Draft Bill, s. 41(1).

[267] *Supra*, this ch., sec. 3(a).

[268] Osler Task Force on Legal Aid, *supra*, note 48.

[269] R.S.O. 1970, c. 239.

[270] Osler Task Force on Legal Aid, *supra*, note 48, at 100 and 127.

We also observe that proceedings in the Federal Court of Canada, which usually are governed by the normal party and party costs rule,[271] are subject to a special rule in the case of proceedings brought under section 28 of the *Federal Court Act*[272] to set aside or appeal a decision of a federal board, commission, or other tribunal. Payment of party and party costs cannot be ordered unless there is a "special reason".[273] Presumably, the decision to institute this general "no way" costs rule was based on a belief that there was a public interest element inherent in these proceedings, and that the operation of the "two way" costs rule would discourage persons from initiating them.

In view of our recommendation to abolish the party and party costs rule in the class action context, it would be appropriate to recall the two policies that the rule furthers. First, it is intended to provide partial compensation for the successful party who has been put to the trouble and expense of securing victory in the action. The second purpose of party and party costs is to discourage persons from asserting unmeritorious claims or defences. There is an issue whether a denial of party and party costs to successful parties in class actions would undermine either or both these policies and, if so, whether it could be justified by the practical exigency of making the class action procedure truly available.

Turning our attention first to the compensatory purpose of party and party costs, it can be seen that to preclude a defendant from obtaining a partial indemnity of his costs undoubtedly would defeat this function. We believe, however, that the denial of party and party costs is justifiable because it applies equally to the class plaintiff. Put another way, both defendant and plaintiff will be freed from the risk of paying costs in a losing action.

We acknowledge that, in a sense, our proposed costs regime will involve a degree of inequality, as the defendant will have to pay his own lawyer, irrespective of the outcome of the action, whereas, in a sucessful action for monetary relief, the class plaintiff will, as we shall explain shortly,[274] be able to look to the class recovery for his solicitor and client costs. We accept this inevitable result of our recommendation, as the alternative – putting the class representative in exactly the same position as the defendant by making him pay full solicitor and client costs – would not leave him in an appreciably better position than he is in under the existing Ontario costs rule: in every case, he would have to bear the full amount of solicitor and clients costs. Moreover, this evenhanded treatment would work an inequity on the class plaintiff in relation to the rest of the class members, who would obtain a benefit at no cost at all.

The second policy justification – to deter specious actions – is a serious concern, because it would be contrary to the public interest and inequitable to

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[271] Federal Court Rules, C.R.C. 1978, c. 663, r. 344(1).

[272] R.S.C. 1970, c. 10 (2d Supp.).

[273] *Supra*, note 271, rr. 1312 and 1408.

[274] See *infra*, this ch., sec. 5(b)(iii).

the defendant to allow a representative plaintiff to initiate an unmeritorious class action solely in the expectation of exacting a settlement from his adversary. It should be recalled, however, that, while there have been allegations in the United States that class actions give rise to "legalized blackmail", this charge has been refuted by the available empirical evidence.[275] Moreover, the danger that inappropriate or unmeritorious class actions may be brought has been addressed specifically in the proposed Ontario *Class Actions Act* by the requirement that a putative class action receive prior judicial approval upon satisfaction of a number of stringent tests, including a preliminary test on the merits of the action[276] and a "cost-benefit" test.[277] It is our belief that the certification motion will filter out unmeritorious suits and actions improperly brought in class form. Hence, there will be no need to rely on the threat of an award of party and party costs to perform this crucial function.

Having decided that party and party costs should not be awarded against a class plaintiff, we considered whether the defendant should receive the same treatment or should continue to be at risk for party and party costs. We already have indicated that we have selected the former alternative, the "no way" rule, in preference to the latter, the "one way" rule. As we have noted, a "one way" costs rule was suggested by Professor Neil Williams in his Model Consumer Class Actions Act and combines proposal, and by the Law Reform Committee of South Australia in its Draft Bill for a Class Actions Act. In support of this recommendation, Professor Williams argued, first, that such a rule was justified by the special importance of class actions in the particular context of consumer and combines litigation and, secondly, that defendants, who were assumed to possess considerable financial resources, would be able to absorb the costs.[278] In Bill C-42 and Bill C-13, however, Professor Williams' proposal was rejected in favour of a general "no way" costs rule.

The obvious problem with a "one way" costs rule is that its asymmetrical approach is unfair to defendants. While the class plaintiff can obtain at least a partial indemnity from the defendant for his costs where he is successful, the defendant is obliged to pay the full amount of his costs, whether or not he is successful.[279]

We believe that a "one way" costs rule would effect an inordinate, unjustifiable displacement of the existing Ontario law of costs which, in theory, treats plaintiffs and defendants equally without regard to their financial position. We recognize that, in practice, any difference in the economic resources possessed by the parties will cause them to be unequally affected by the threat of an adverse award of costs, and that this undermines

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[275] See *supra*, ch. 4, sec. 3(b)(i)a.

[276] See Draft Bill, s. 3(3)(*a*).

[277] *Ibid.*, s. 6.

[278] See Williams Combines Class Actions, *supra*, note 61, at 70 and 79-81, and Williams Consumer Class Actions, *supra*, note 54, at 48 and 51-52.

[279] For a critique of this argument, see Prichard, "Private Enforcement and Class Actions", in Prichard, Stanbury, and Wilson (eds.), *Canadian Competition Policy: Essays in Law and Economics* (1979), at 245.

the assumption of economic parity that underlies the present costs rules. While the introduction of a provincial legal aid scheme was an innovation that did respond to the plight of the economically weak litigant, it has had no impact on the application of the party and party costs rule to legally-aided clients. Such clients remain at risk for party and party costs, although they may seek assistance from the Plan.[280]

In recommending that the existing costs rules should not apply to class actions under the proposed *Class Actions Act*, but should be replaced by a new costs regime, our intention is not to solve the problem that litigants are often unequally matched in terms of wealth. Our objective is to devise rules that will permit meritorious class actions to be initiated. Undoubtedly, a "one way" costs rule would facilitate class actions. Yet it would do so at the price of unfairness to defendants. It may be argued that, as in the United States, such a rule might be justifiable, on a private enforcement theory, in certain substantive law areas, and particularly where a defendant has violated a regulatory statute.[281] However, we believe that the uneven treatment inherent in a "one way" rule is not supportable in a class action procedure that is intended to have a broad application to all civil causes of action that now may be asserted under Rule 75 of the Supreme Court of Ontario Rules of Practice.

As we indicated earlier, our proposal in favour of a "no way" costs rule applies to both the certification hearing and the common questions stage of a class action. In making the certification hearing subject generally to a "no way" rule, the proposed *Class Actions Act* differs from certain of the class action procedures drafted or influenced by Professor Neil Williams. In the Draft Bill for a Class Actions Act proposed by the Law Reform Committee of South Australia, the Model Consumer Class Actions Act, and Williams' combines proposal, it appears that the party and party costs rule, that costs normally follow the event, governs the certification motion.[282] In Bill C-13

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[280] See *supra*, this ch., sec. 2(c).

[281] Section 29 of the Saskatchewan *Consumer Products Warranties Act*, R.S.S. 1978, c. C-30, provides that, where a consumer is a plaintiff, or where he defends an action or counterclaim in an action brought against him, "no costs shall be awarded against the consumer or such person regardless of whether he is successful in the action, defence or counterclaim unless, in the opinion of the court, the action, defence or counterclaim was frivolous or vexatious". See, generally, Ramsay, "Consumer Redress Mechanisms for Poor-Quality and Defective Products" (1981), 31 U. Toronto L.J. 117, at 139-46.

[282] This can be illustrated by reference to Williams' Model Act, *supra*, note 255. Section 11 institutes the "one way" costs rule. Subsection (1) provides that, subject to s.s. (2), "the costs of a class action are in the discretion of the court and the court has full power to determine by whom and to what extent the costs shall be paid". This language is virtually identical to that of s. 80(1) of the *Judicature Act*, R.S.O. 1980, c. 223. Hence, as a general rule, as in individual actions, costs ordinarily would follow the event. The "one way" rule is created by s.s. (2), which provides that costs cannot be awarded to the defendant, except on the certification motion, proceedings to determine individual claims, and interlocutory motions. In individual proceedings, it is clear that the costs rules governing individual actions are to apply, as this is expressly provided for in s. 9(5). With respect to the certification motion and interlocutory proceedings, similarly explicit provisions are not found in the Model Act. Section 11(2) simply states that, on certification and interlocutory motions, "the court may award costs to the defendant". If this is read against the background of s. 11(1), it appears that the party and party costs rule of individual litigation should apply.

and Bill C-42, as an exception to the general "no way" costs rule, costs may be awarded to a party on certification; it is not clear, however, whether the party and party costs rule was intended to apply.

We believe that the institution of a "two way" costs rule on certification would undermine our guiding objective of removing those costs disincentives attributable to the fact that the action is proceeding in class, rather than individual, form. In view of the nature of the certification tests that we have recommended,[283] we anticipate that this hearing will not be a perfunctory exercise, but will be a comprehensive inquiry into the merits and propriety of a putative class action. The costs involved in preparing and conducting the application might well be substantial. Hence, it is our apprehension that, were the "two way" costs rule to apply, the threat of paying the costs of an unsuccessful application would constitute an inordinate deterrent, causing persons to decline to bring class actions.

We observe that the South Australia Draft Bill and Professor Williams' Model Consumer Class Actions Act, which appear to have a "two way" rule on certification, recommend that a "one way" costs rule should apply on the determination of the common questions. Under a "one way" costs regime, there is a danger that persons might bring unmeritorious actions, secure in the knowledge that they would not be at risk for party and party costs if they lost at trial, and that they usually would obtain a partial costs indemnity from the defendant if they were successful. Hence, in the view of Professor Williams and the Law Reform Committee of South Australia, it made good sense to institute a "two way" costs rule on certification in order to deter the commencement of spurious class actions.

We have justified our recommendation to make the class representative immune from an award of party and party costs at the common questions stage on the ground that the function of filtering out unmeritorious actions would be performed by the certification procedure. In our view, requiring the putative class action to be approved by the court will be an adequate substitute for the threat of an adverse costs award. However, we are concerned that, if the normal party and party costs rule is not to apply at the certification hearing, there is a danger that unmeritorious applications for certification may be brought by prospective representative plaintiffs who are not at risk for costs, as there is no pre-screening of these applications. The question is whether the loss of deterrence through abrogation of the normal costs rule at the certification stage would encourage such behaviour on the part of representative plaintiffs who have nothing to lose and hope to threaten the defendant with the costs of defending a class action.

The consequences of a "no way" costs rule at certification are difficult to predict. That it would lead to abusive behaviour on the part of class plaintiffs, to the disadvantage of defendants and to the detriment of the court system, certainly is not clear. However, in order to deal with the possibility that unmeritorious applications for certification may be initiated, we believe that there should be an exception to the general "no way" costs rule that we have proposed. It is our recommendation that, on the hearing of the certification

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[283] See *supra*, chs. 7, 8, and 9.

motion, the court should be empowered to award costs where it would be unjust to deprive the successful party of costs.[284] This discretion is intended to allow the court to make an award of party and party costs to deal with circumstances in which no reasonable plaintiff or no reasonable class lawyer should have attempted to obtain certification. We believe that the creation of this residual power to award costs will achieve an effective balance among the interests of the parties and, by discouraging the initiation of specious class actions, will be in the larger public interest.

While we have proposed a general rule that costs should not be awarded to any party at the certification and common questions stages of class proceedings, we do not wish to deprive a court of its inherent power to employ costs as a disciplinary sanction against inappropriate behaviour, either by a party or by a lawyer.[285] Otherwise, persons would be able to engage with impunity in conduct that now is clearly unacceptable. Hence, we recommend a second exception to our general rule, allowing the court, at any stage of the proceedings, to award costs in the event of vexatious, frivolous, or abusive conduct on the part of any party.[286]

Finally, we recommend that, where costs are awarded to a defendant under either of these exceptions, the class representative alone, and not absent class members, should be liable.[287] Underlying the exceptions is the policy that undesirable behaviour, either in initiating specious proceedings or in the conduct of an action, should be discouraged. If a costs award against a representative plaintiff were borne by all class members, its deterrent effect would be lost. Moreover, until an action is certified as a class action, individuals are not members of a class. If certification is denied, it would be unfair to ask them to contribute to the costs of unsuccessful proceedings of which they may be unaware. Apart from these objections of principle, as a practical matter, it would be inordinately difficult, if not impossible, to identify these individuals and to collect money from them, particularly if the action were not certified.

(b) Solicitor and Client Costs

We have explained that, under the present Ontario law, a class representative is solely responsible for the payment of the fees and disbursements of the class lawyer. If the action fails, he ordinarily will bear the full brunt of this burden. If the action is successful, the difference between the amount of solicitor and client costs and the amount of party and party costs awarded will be the extent of the representative plaintiff's financial obligation to the lawyer.

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[284] See Draft Bill, s. 41(1)(*a*).

[285] See, generally, Gold, "Controlling Procedural Abuses: The Role of Costs and Inherent Judicial Authority" (1977), 9 Ottawa L. Rev. 44, and Lantz, "Costs as a Regulatory Device" (1981), 2 Advocates' Q. 396.

[286] See Draft Bill, s. 41(1)(*b*).

[287] *Ibid.*, s. 41(3).

Unless a class representative has concluded separate agreements with other class members that oblige them to contribute to the costs for which he is responsible, he will have no legal right to demand direct financial support from them. The result of the current position is that, even if successful, a representative plaintiff can expect to finish a class action out of pocket, unless he has a very large, individually recoverable claim, in which case he likely would prefer to commence an individual action. Hence, the responsibility for solicitor and client costs is by itself a substantial, perhaps insurmountable, deterrent to a prospective class plaintiff. If our recommendation to institute a general "no way" costs rule were implemented without further modifications to the existing costs regime, the position of the representative plaintiff might, in a sense, be worse than under the present law, as no part of his solicitor and client costs could be recovered from the defendant in a successful action.

It is our belief that the burden of solicitor and client costs, like the burden of party and party costs, must be transferred from the representative plaintiff if the recommended class action procedure is to be workable. As a practical matter, this burden can be shifted to only the class, a government fund, or the class lawyer.

Before a decision can be made concerning the desirability of transferring the responsibility for solicitor and client costs to one or more of these alternative sources, one must evaluate the efficacy of each of them assuming this burden. In conducting this examination, it is necessary to have regard to two factors. First, one must consider the utility of each alternative in both successful and unsuccessful actions. Secondly, the issue must be examined from the perspective of the kind of relief sought in the class action. In other words, the problem is whether each alternative allows the cost to be effectively transferred in both class actions for monetary relief and those seeking exclusively non-monetary relief.

(i) The Class

Earlier in this chapter, we explained that, in the absence of enforceable agreements, a class representative has no legal right to demand or compel financial contributions from the class. If the class were a viable source of funds, conceivably this could lessen, or even relieve, the class plaintiff of the burden of paying his lawyer in both successful and unsuccessful class actions. We have suggested, however, that it would be imprudent to base costs rules on the supposition that financial donations from absent class members would be made voluntarily.[288]

Contributions, however, need not be voluntary. If funds could be gathered from class members without their express consent, the burden of solicitor and client costs would be removed from the representative plaintiff. In making this observation, we do not intend to intimate that the class representative, the class lawyer, the court, or any other participant in the class action should be empowered to force direct contributions from class members. To exact donations from absent class members who may wish to exclude

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[288] *Supra*, this ch., sec. 2(d).

themselves from the action or who do not support the suit would be unfair. Moreover, without precise knowledge of both the size of the class and the amount of the fees, it would be difficult, if not impossible, to calculate in advance the appropriate amount of each contribution; neither of these matters could be settled until the termination of the class action. Should the class members resist contribution at this stage, effective measures to ensure payment would be expensive and laborious.

Indirect contributions could be effected, however, through *pro rata* deductions from the shares of absent class members in a class recovery. In essence, this is the way in which attorneys' fees are levied in the United States. It will be recalled that, on the basis of the common fund doctrine, lawyers' fees may be deducted from a settlement fund or from a damages award in favour of a class. Moreover, it has been a long-accepted principle in Ontario that strangers who benefit from an action that creates or increases a fund in which they have an interest should be obliged to contribute to the costs of that action. At common law, a creditor whose action preserves an asset of a debtor, thereby benefiting other creditors, was entitled to be awarded costs from any resulting fund; consequently, his fellow creditors would indirectly share the expense of the action.[289]

Several of the class action procedures proposed to date have recommended that costs should be deducted from the class recovery. As we have explained, Bill C-13 and Bill C-42 would implement a "no way" costs regime in which "the reasonable solicitor and client costs of the member or members of the class who commenced the proceedings . . . constitute a first charge on a *pro rata* basis against amounts ordered to be paid".[290] In his Model Consumer Class Actions Act, Professor Williams recommended that, where there is an aggregate assessment, the court should have a discretion to order the whole or part of the costs awarded to the plaintiff on a solicitor and client basis to be paid out of the aggregate fund.[291] The Draft Bill for a Class Actions Act proposed by the Law Reform Committee of South Australia provided that a scheme for the payment of the fees and expenses of the class plaintiff's lawyer may include provisions stipulating that the difference between solicitor and client costs and party and party costs should be paid out of the "fruits of the action" or that the class lawyer should have "a first charge for his costs on the fruits of the litigation".[292]

(ii) Government Fund

As we have discussed, in addressing the question of solicitor and client costs, the Province of Quebec has decided to rely on a government fund known as the "Fonds d'aide aux recours collectifs". Under the Quebec

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[289] See McCamus, "The Self-Serving Intermeddler and the Law of Restitution" (1978), 16 Osgoode Hall L.J. 515, at 566-61. The general principle of contribution appears to be implemented in the *Creditors' Relief Act*, R.S.O. 1980, c. 103, ss. 5(2) and 26.

[290] Bill C-42, *supra*, note 65, s. 39.2(2), and Bill C-13, *supra*, note 65, s. 39.18(2).

[291] Williams' Model Act, *supra*, note 255, s. 11(3)(b).

[292] See *supra*, note 246 and accompanying text.

legislation, a class plaintiff may apply to the Fonds for financial assistance to defray the cost of lawyers' fees and disbursements, including the cost of notice. If assistance is granted and the class action is successful, the Fonds will be reimbursed, at least in part, by the award of party and party costs. If the class action fails, the Fonds bears the loss.

The creation of a government fund is a solution to the problem of solicitor and client costs that can be equally efficacious in class actions for monetary relief and those in which exclusively non-monetary relief is sought. Before endorsing a scheme of government financial assistance, however, there must be a fundamental policy decision that the general public, through the provincial government, should subsidize class litigation. Conceivably, public funding could be justified on the basis that a class action procedure constitutes a means of providing access to justice for persons with injuries that otherwise would remain uncompensated. By providing direct benefits to potentially large numbers of persons other than the active litigants, class actions could be considered to have a "public" character which, arguably, could support demands for government financial assistance. This appears to be the philosophical foundation supporting the establishment of the Fonds in Quebec.[293]

In contexts other than class actions, the Legislative Assembly of Ontario has shown a willingness to allocate funds in order to facilitate access to justice. This can be seen in the establishment of courts under the *Small Claims Courts Act*[294] and the *Provincial Court (Civil Division) Project Act*[295] to handle modest pecuniary claims in a relatively inexpensive, expeditious, and informal manner. It is also evident in the decision to institute a provincial legal aid scheme, which involves government subsidization of litigation that otherwise would not be initiated. The commitment to affording effective access to individuals suffering harm that, for economic reasons, would not ordinarily lead to litigation is evinced, as well, in the *Business Practices Act*,[296] which provides that the Director of the Consumer Protection Division of the Ministry of Consumer and Commercial Affairs "shall, [*inter alia*] . . . receive and act on or mediate complaints respecting unfair practices".[297]

It also might be argued that the other acknowledged purposes of class actions – as a means of achieving judicial economy and as a private law enforcement tool that encourages potential wrongdoers to obey the law – have a public component and, therefore, justify granting some degree of government financial assistance.

In Part I of its Report,[298] the Osler Task Force on Legal Aid recommended that "class actions and group proceedings should be funded in appropriate

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[293] See *supra*, note 216.

[294] R.S.O. 1980, c. 476.

[295] R.S.O. 1980, c. 397.

[296] R.S.O. 1980, c. 55.

[297] *Ibid.*, s. 5(*b*).

[298] Osler Task Force on Legal Aid, *supra*, note 48, at 95-101.

cases".[299] In support of this proposal, the Task Force seemed to argue that this extension of legal aid was justified on practical, rather than philosophical, grounds, that is, as a pragmatic response to the growing trend of citizens seeking to obtain relief as members of a group.

(iii) Conclusions Respecting the Burden of Solicitor and Client Costs in Successful Class Actions

For both philosophical and practical reasons, the Commission does not believe that public moneys should be used to fund class litigation. In chapter 6,[300] when we discussed alternative class action models that might be instituted in Ontario, we rejected a "public" class action model, which would involve the Attorney General for Ontario in the initiation and prosecution of class litigation; it was our firm view that the class action procedure should depend on private initiative. Consistent with this position, we believe that the financial responsibility for the conduct of class litigation similarly should be assumed by private citizens, rather than by the Ontario government.

Our philosophical opposition is strengthened by practical considerations that we believe militate strongly against the establishment of a government fund to finance class actions. Any attempt to implement such a proposal would entail considerable expenditure of time and money in the organization and maintenance of an administrative structure that is capable of managing the fund and regulating access to it. From the Quebec legislation, it is evident that a scheme of public funding would require the institution of a procedure distinct from the class action procedure. An application for public funding would have to be made and processed; a determination would have to be made respecting the financial resources of the applicant and, possibly, the likely merit of the action; the fund would have to monitor the conduct of the action and how the expenses are being incurred at each step by the party receiving assistance. Finally, representatives of the fund might have to appear at those stages of the proceedings where costs are in issue.

Nor do we believe that an expansion of legal aid, to permit the initiation of class actions, is an appropriate solution as a matter of principle. The central problem in terms of access to justice in class actions is not the inadequate financial resources of the class plaintiff, at least not in the ordinary sense, but rather the inequitable effects of existing cost rules. These inequitable effects apply to both wealthy and poor, and prevent the initiation of actions in both cases. To invoke legal aid in order to fund class actions would involve a distortion of its traditional purpose and direction, that is, to aid impecunious litigants. If the purpose of legal aid were expanded to include assistance to class representatives, this would be tantamount to a scheme of public funding, which we have rejected.

In our view, it is fair to require class members who benefit from a successful class action to pay for the cost of its prosecution. Accordingly, it is

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[299] *Ibid.*, at 127.

[300] *Supra*, ch. 6, sec. 1(b)(iii).

our recommendation that the proposed Ontario *Class Actions Act* should provide that, in all cases, the fees and disbursements payable by a class representative to a class lawyer should be deducted from the monetary relief to which the class is entitled. The share of each class member should be reduced so that he will contribute an amount equal to the proportion that his share constitutes of the total recovery.[301]

However, deducting costs from a recovery is only a partial solution to the question of solicitor and client costs. If the class action seeks exclusively non-monetary relief, such as an injunction, there will be no monetary recovery from which fees and disbursements can be deducted. While the position of a class representative in a class action for non-monetary relief compares unfavourably with that of a class representative in a class action for monetary relief, we do not recommend a special costs rule. The only possible alternatives that would relieve the costs burden are shifting costs to an unsuccessful defendant or providing financial assistance through a government fund. For reasons that we have discussed, we have rejected both of these alternatives as a matter of general principle.

Having discussed the problem of how costs can be shifted from the shoulders of the representative plaintiff in successful actions, we turn now to discuss the efficacy of the possible alternatives in an unsuccessful action.

(iv) Conclusions Respecting the Burden of Solicitor and Client Costs in Unsuccessful Class Actions

In an unsuccessful class action, by definition, there will be no class recovery from which indirect contributions to the solicitor and client costs can be effected. Hence, the class is an alternative only insofar as it is possible to realize voluntary donations from its members. We have already expressed our doubt that contributions will be made and we need not belabour this point. In a previous section, we also considered the alternative of creating a scheme of government financial assistance for class action litigation. However, for both philosophical and practical reasons, we rejected that suggestion.

Given our view that neither the class nor a government fund should be relied upon to bear the burden of solicitor and client costs in unsuccessful class actions, we believe that the only possible solution is to allow that burden to be transferred to the class lawyer. Accordingly, we recommend that, notwithstanding the *Solicitors Act* and *An Act respecting Champerty*,[302] a representative plaintiff and a class lawyer should be entitled to enter into an agreement in writing that stipulates that the latter will be entitled to receive his fees and disbursements only in the event of success in the action.[303] Entitlement to fees and disbursements will arise, for example, where there has been a favourable determination of the common questions or judicial approval of a settlement that benefits the class.[304] Since, in an unsuccessful

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[301] See Draft Bill, s. 45(1).

[302] See discussion *supra*, this ch., sec. 2(b).

[303] See Draft Bill, s. 42(1).

[304] *Ibid.*, s. 42(2).

action, the lawyer will receive nothing, such an agreement will effectively transfer the financial risk inherent in failure from the class plaintiff to the lawyer.

We recommend, however, that, in an agreement of the kind proposed above, a class lawyer and representative should not be permitted to specify the amount of the lawyer's remuneration nor its method of calculation – for example, by a gross sum, commission, percentage, or salary – and any attempt to do so should be void.[305] Instead, it should be the task of a judge alone to assess the appropriate costs, relying on the same criteria that are now employed in the taxation of a solicitor's account, except that the judge should be obliged to include an amount that will compensate the lawyer for accepting the risk of non-payment in undertaking the litigation on this basis.[306] We shall explain these facets of our proposal in due course.

The kind of arrangement that we have described is "contingent", in the sense that the lawyer's entitlement to costs will be contingent on success. However, it differs significantly from a "contingent fee", as the term is popularly understood. In common usage, the expression "contingent fee" usually means a fee that is an agreed percentage of a damages award, and that ordinarily is not subject to any judicial scrutiny; unless challenged by the client, the percentage stipulated in the agreement is determinative of the amount of the lawyer's remuneration. The criticisms often associated with the term "contingent fee" generally relate to the use in individual actions of a percentage fee agreement without judicial supervision, rather than to the kind of arrangement that we have proposed.

To allow lawyers in class litigation to enter into agreements of the kind that we have outlined would introduce a major change to the existing Ontario costs regime. Clearly, at present, such agreements are proscribed by section 30 of the *Solicitors Act*,[307] which provides as follows:

> 30. Nothing in sections 18 and 35 gives validity to a purchase by a solicitor of the interest or any part of the interest of his client in any action or other contentious proceeding to be brought or maintained, or gives validity to an agreement by which a solicitor retained or employed to prosecute an action or proceeding stipulates for payment only in the event of success in the action or proceeding, or where the amount to be paid to him is a percentage of the amount or value of the property recovered or preserved or otherwise determinable by such amount or value or dependent upon the result of the action or proceeding.

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[305] *Ibid.*, s. 42(3).

[306] *Ibid.*, s. 42(4).

[307] R.S.O. 1980, c. 478. This ban is reinforced by r. 10, para. 9, of the Rules of Professional Conduct of The Law Society of Upper Canada. It provides as follows:

> 9. A lawyer should not, except as by law expressly sanctioned, acquire by purchase or otherwise any interest in the subject matter of litigation being conducted by him. It is improper for him to enter into an arrangement with his client for a contingent fee except in accordance with the provisions of the Solicitors Act.

See The Law Society of Upper Canada, *Professional Conduct Handbook* (1978), r. 10, para. 9 (footnote omitted).

In its *Report on The Solicitors Act*, this Commission recommended legislation that would include a provision very similar to the present section 30.[308] Recently, the Professional Organizations Committee considered the possibility of sanctioning the use of contingent fees in Ontario as a means of financing civil litigation. It recommended that "[t]here should be no relaxation of the current prohibition of contingent fees . . . in Ontario".[309] In view of the longstanding ban on contingent arrangements in this Province[310] and elsewhere[311] and the support for its continuation in many quarters, it is incumbent upon this Commission to discuss in some detail the reasoning underlying our proposal to make an exception in the class action context. Before we do so, we wish to emphasize that we have not considered the issue whether contingent arrangements of any type should be permitted in Ontario for individual litigation.

We shall commence by describing the historical development of the prohibition against contingent fees in Ontario. We then shall discuss the approach taken to contingent fees in other jurisdictions in Canada. Finally, we shall examine the competing policy arguments in light of both the circumstances of class litigation and the particular nature of the type of arrangement that is proposed in this chapter.

a. Common Law Background to the Prohibition Against Contingent Fees

The historical antecedents of the prohibition against contingent fees contained in section 30 of the *Solicitors Act* were the common law rules against maintenance and champerty.[312] Maintenance has been defined to

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[308] Ontario Law Reform Commission, *Report on The Solicitors Act* (1973), at 54-55.

[309] Province of Ontario, Ministry of the Attorney General, *Report of the Professional Organizations Committee* (1980), at 212.

[310] However, it has been acknowledged that, in Ontario, some lawyers now enter into what have been called "*de facto* contingent fee agreements". Apparently this expression refers to informal arrangements in which lawyers and clients understand that the case will be taken on the basis that the lawyer's usual fee will be requested should the action succeed, but no fee or a nominal fee will be demanded in the event of failure. If, indeed, this accurately describes the practice of some Ontario lawyers, our proposal seems less radical.

[311] In England, s. 59 of the *Solicitors Act 1974*, c. 47, is similar to s. 30 of the Ontario Act. In Australia, contingency fee agreements have been prohibited by legislation: see, for example, *Supreme Court Act 1958*, Vict. Stat. 1958, No. 6387, s. 87(6); *Legal Practitioners Act, 1936-1972*, Pub. Gen. Acts S. Austl. 1837-1975, Vol. 5, s. 21; and *The Solicitors Act, 1891*, Queensl. Stat. 1889-93, No. 22, s. 10. For discussion, see Birrell, "Contingent Fees – A Viable Alternative" (1981), 55 Aust. L.J. 333. In New Zealand, s. 56(1) of the *Law Practitioners Act 1955*, Repr. Stat. N.Z. 1908-1957, No. 101, provides that "[a] solicitor may in writing agree with a client (not being a Maori) as to the amount and manner of payment of costs for the whole or any part of any past of future services, either by a gross sum or by commission, percentage, salary, or otherwise". For commentary, see Grant, "Contingency Fees", [1980] N.Z.L.J. 334. It should also be observed that para. 6.18 of the New Zealand Law Society Code of Ethics states that contingent fees are "not sanctioned".

[312] For a discussion of the origins and early development of maintenance and champerty, see Winfield, "The History of Maintenance and Champerty" (1919), 35 L.Q. Rev. 50; Radin, "Maintenance by Champerty" (1935-36), 24 Calif. L. Rev. 48; Fleming, *The Law*

mean "where one officiously intermeddles in a suit . . . which in no way belongs to him, by assisting either party with money, or otherwise, in the prosecution or defence of any such suit".[313] Champerty is a term derived from the phrase *campi partitio* and refers to a species of maintenance in which a person unlawfully maintains an action for a share of the proceeds that may be realized as a consequence of the suit. Maintenance and champerty were both crimes and torts.

Rules against maintenance and champerty were introduced over 700 years ago in response to abusive interference in the legal system by powerful royal officials and nobles. Although the particular abuses against which the prohibitions were directed had been cured by the time of the Tudors, the rules continued to survive. In modern decisions concerning maintenance, courts do not refer to the mediaeval origins of the doctrine, but justify its continued existence on the basis of public policy considerations.[314] The antipathy of the courts to champertous agreements similarly is supported by policy concerns. In these expressions of policy are the roots of the arguments justifying the present ban on contingent fees.

The primary policy consideration underlying the ban on maintenance appears to be a concern that third parties should not incite persons to initiate or to defend suits that otherwise would not be brought or defended.[315] It was feared that maintenance would lead to an increase in the number of actions, which was thought to be detrimental to the public interest. It has been suggested that this apprehension reflected a deeply entrenched English attitude that litigation itself was a socially disruptive evil.[316]

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of Torts, (5th ed., 1977), at 611-13; Arlidge, "Contingent Fees" (1974), 6 Ottawa L. Rev. 374, at 378-80; The Law Commission, *Proposals for Reform of the Law Relating to Maintenance and Champerty* (Law Com. No. 7, 1966); and Winfield, "*Neville v. London Express Newspaper, Ltd.*" (1919), 35 L.Q. Rev. 233.

[313] *Neville v. London "Express" Newspaper, Ltd.*, [1919] A.C. 368, at 378-79, [1918-19] All E.R. Rep. 61 (H.L.), *per* Lord Finlay L.C., quoting *Hawkins' Pleas of the Crown* (8th ed., 1824), Vol. 1, s. 3, at 454.

[314] The following passage from *Martell v. Consett Iron Co. Ltd.*, [1955] Ch. 363, at 382, [1954] All E.R. 339 (subsequent references are to [1955] Ch.), is often quoted:

> [H]ow can such a doctrine founded upon considerations of public policy become at some point frozen into immutable respectability, so as to be no longer capable of alteration? . . . It seems to me that unless the law of maintenance is capable of keeping up with modern thought, it must die in a lingering and discredited old age.

[315] In *Goodman v. The King*, [1939] S.C.R. 446, at 453, [1939] 4 D.L.R. 361, Kerwin J., who delivered the decision of the Court, stated:

> [T]here must exist that officious interference, that introduction of parties to enforce rights which others are not disposed to enforce, that stirring up of strife, to constitute the crime of maintenance.

See, also, *Newswander v. Giegerich* (1908), 39 S.C.R. 354, at 362-63; *Sheppard v. Frind*, [1941] S.C.R. 531, at 534; and *Wiegand v. Huberman* (1979), 18 B.C.L.R. 102 (S.C.), at 103-04.

[316] See Radin, "Contingent Fees in California" (1940), 28 Calif. L. Rev. 587, at 587-88, and Zander, *Lawyers and the Public Interest* (1968), at 116-18.

Compared to modern cases, earlier cases took a much stricter view of maintenance. Courts held that any financial support of an action without lawful excuse constituted maintenance, regardless of the motives of the maintainer. Gradually the courts broadened the scope of lawful justification in accordance with changing notions as to what kinds of third party support of litigation were permissible. By expanding the circumstances in which the costs of an action could be defrayed by others, this development might have had the effect of bringing more actions into the courts. This consideration, however, apparently did not have sufficient strength to convince the courts that they should not sanction financial support that, in the past, would have constituted improper maintenance.[317]

In *Martell v. Consett Iron Co. Ltd.*,[318] Lord Danckwerts explained the underlying justification for permitting non-parties to advance funds to litigants:[319]

> This happens to be a case about the interests of anglers, but the principle involved is of much greater importance. It would be disingenuous to disregard the difficulties which the man of small financial resources (not confined to the legal aid class) faces in present-day conditions in defending such rights as he may have against infringement by powerful commercial corporations or adversaries who may draw their strength from the rates or the national exchequer. If such a man may not avail himself of the help of sympathizers, his condition may be serious indeed. His relative position is still more unfavourable if his powerful commercial opponents may deduct the cost of such litigation as trade expenses.

While the courts relaxed their initially stringent attitude to maintenance, a similar development did not attend their treatment of champerty. In *In re Trepca Mines Ltd. (No. 2)*, Lord Denning explained:[320]

> Maintenance may, I think, nowadays be defined as improperly stirring up litigation and strife by giving aid to one party to bring or defend a claim without just cause or excuse. At one time, the limits of 'just cause or excuse' were very narrowly defined. But the law has broadened them very much of late . . . and I

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[317] This development was noted by Scarman L.J., in *Wallersteiner v. Moir (No. 2)*, *supra*, note 73, at 407-08:

> Times have changed since 1896, and indeed in one significant respect since 1963, when *In re Trepca Mines Ltd. (No. 2)* was decided. The maintenance of other people's litigation is no longer regarded as a mischief: trade unions, trade protection societies, insurance companies and the state do it regularly and frequently. The law has always recognized that there can be lawful justification for maintaining somebody else's litigation; today, with the emergence of legal aid, trade unions, and insurance companies, a great volume of litigation is maintained by persons who are not parties to it.

See similar statements to this effect by Lord Denning in *Hill v. Archbold*, [1968] 1 Q.B. 686, at 694-95, [1967] 3 All E.R. 110, at 112 (C.A.), and *In re Trepca Mines Ltd. (No. 2)*, [1963] Ch. 199, [1962] 3 All E.R. 351 (C.A.) (subsequent references are to [1963] Ch.). See, also, Fleming, *supra*, note 312, at 614-15, and The Law Commission, *supra*, note 312, at 4.

[318] *Supra*, note 314.

[319] *Ibid.*, at 375.

[320] *Supra*, note 317, at 219-20.

> hope they will never again be placed in a strait waistcoat. But there is one species of maintenance for which the common law rarely admits of any just cause or excuse, and that is champerty. Champerty is derived from campi partitio (division of the field). It occurs when the person maintaining another stipulates for a share of the proceeds .... The reason why the common law condemns champerty is because of the abuses to which it may give rise. The common law fears that the champertous maintainer might be tempted, for his own personal gain, to inflame the damages, to suppress evidence, or even to suborn witnesses. The fears may be exaggerated; but, be that so or not, the law for centuries has declared champerty to be unlawful, and we cannot do otherwise than enforce the law, and I may observe that it has received statutory support, in the case of solicitors, in section 65 of the Solicitors Act, 1957.

The articulated reason for the prohibition was that, if the practice were allowed, specific abuses obnoxious to the administration of justice might follow.

Although the doctrines of maintenance and champerty were not directed originally at lawyers alone, from Tudor times the rules have been particularly important in their application to them. It is this use of these rules that constitutes the common law background to the prohibition against contingent fee arrangements.

At common law, it is well established that it is improper for a lawyer to make an agreement whereby he is to receive a percentage or share of the proceeds of an action.[321] It has been suggested, however, that it is permissible for a lawyer to advance disbursements to his client and to seek reimbursement out of the moneys realized by a successful judgment.[322] There are conflicting cases on the question whether a lawyer may conclude an agreement that he will seek his solicitor and client costs out of the proceeds of the

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[321] See, for example, *Strange v. Brennan* (1845), 15 Sim. 346, 60 E.R. 652, aff'd on appeal (1846), 2 Coop. Cott. 1, 47 E.R. 1018 (Ch.); *Pince v. Beattie* (1863), 32 L.J.Ch. 734, 9 L.J. 315; *Re Steel* (1895), 39 Sol. Jo. 710; *Wild v. Simpson*, [1919] 2 K.B. 544, [1918-19] All E.R. Rep. 682 (C.A.); *Haseldine v. Hosken*, [1933] 1 K.B. 822, [1933] All E.R. 1; and *Re Mack; ex parte New South Wales Bar Association* (1968), 88 N.S.W.W.N. 68 (C.A.).

[322] In *Clyne v. New South Wales Bar Association, supra*, note 42, at 203, the High Court of Australia made the following *obiter dicta* remarks:

> It would appear indeed to be impossible for a solicitor to be held, in relation to legal proceedings conducted for a client, to be guilty of maintenance except perhaps in two cases, one of which might amount to champerty. For a solicitor could hardly be held guilty of a crime in respect of conduct which is recognized by the law as perfectly proper professional conduct. And it seems to be established that a solicitor may with perfect propriety act for a client who has no means, and expend his own money in payment of counsel's fees and other outgoings, although he has no prospect of being paid either fees or outgoings except by virtue of a judgment or order against the other party to the proceedings. This, however, is subject to two conditions. One is that he has considered the case and believes that his client has a reasonable cause of action or defence as the case may be. And the other is that he must not in any case bargain with his client for an interest in the subject matter of litigation, or (what is in substance the same thing) for remuneration proportionate to the amount which may be recovered by his client in a proceeding.

See, also, *Ladd v. London Road Car Company* (1900), 110 L.T. Jo. 80.

judgment, but will forego remuneration in the event of failure.[323]

In 1966, the English Law Commission studied the law relating to maintenance and champerty as part of its mandate to examine "[m]iscellaneous matters involving anomalies, obsolescent principles or archaic procedures".[324] It recommended the abolition of maintenance and champerty as both crimes[325] and torts,[326] but concluded that champertous agreements, which included contingent fee arrangements, should remain unlawful as contrary to public policy. The Law Commission, however, did urge that the question of contingent fee agreements should be the subject of further study.[327] In 1967, the recommendation to abolish maintenance, including champerty, as a crime and a civil cause of action was implemented in the *Criminal Law Act 1967*.[328] This statute stated that it did not affect "any rule . . . as to the cases in which a contract is to be treated as contrary to public policy or otherwise illegal".[329] It thus preserved the common law rule that contingent fee agreements are unenforceable.[330] The common law position is reinforced by other legislation and rules to which lawyers are subject. The English *Solicitors Act 1974*[331] contains a provision similar in

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[323] *Sievwright v. Ward, supra*, note 41, would allow a lawyer to agree to seek his costs out of a damages award, but to forego payment in an unsuccessful action, so long as the agreement does not stipulate for a percentage or "more than his reasonable costs". See contra the remarks of Lord Denning in *Wallersteiner v. Moir (No. 2), supra*, note 73, at 860, which classified as champerty an agreement stipulating for payment of a specific sum only in the event of success, and *Alabaster v. Harness*, [1894] 2 Q.B. 897, at 900, *per* Hawkins J.

[324] The Law Commission, *supra*, note 312, at 3.

[325] *Ibid.*, at 4:

> Maintenance and champerty as crimes are a dead letter in our law. There are no records of any prosecution for either for many years past. They do no more today than add unnecessarily to the length of legal textbooks and the statute book. To rid the law of these crimes would be merely to clear away lumber discarded in practice, though not in theory destroyed.

[326] *Ibid.*, at 5:

> The truth is that today the great bulk of the litigation which engages our courts is maintained from the sources of others, including the state, who have no direct interest in its outcome but who are regarded by society as being fully justified in maintaining it. When one further reflects how little is the scope left to the action for damages for maintenance and how formidable the difficulties of proof, one is bound to ask whether its retention in the law serves any useful purpose.

[327] In 1979, the United Kingdom Royal Commission on Legal Services opposed the introduction of contingent fees: see *Final Report of The Royal Commission on Legal Services* (Cmnd. 7648, 1979), Vol. 1, at 176-77. For a discussion of this issue in the United Kingdom, see Youngwood, "The Contingent Fee – A Reasonable Alternative?" (1965), 28 Mod. L. Rev. 330; White, "Contingent Fees: A Supplement to Legal Aid?" (1978), 41 Mod. L. Rev. 286; and Zander, *supra*, note 316, at 116-18.

[328] *Criminal Law Act 1967*, c. 58, ss. 13 and 14.

[329] *Ibid.*, s. 14(2).

[330] See, for example, *Wild v. Simpson, supra*, note 321, and *In re Trepca Mines Ltd. (No. 2), supra*, note 317.

[331] C. 47, s. 59.

scope to section 30 of the Ontario *Solicitors Act*. In addition, the Solicitors' Practice Rules 1936-72 forbid a solicitor from "[entering] into any agreement or arrangement to receive a contingency fee in respect of that action, suit or other contentious proceeding".[332]

b. Contingent Fees in Ontario

The law governing maintenance and champerty was incorporated into the law of what is now Ontario with the reception of English law into the newly-formed Province of Upper Canada in 1792.[333] There has been very little case law in Ontario concerning the applicability of the prohibitions to lawyers. The few decisions, moreover, afford little insight into the policy considerations underlying the rules.[334] However, in *Re Solicitor*,[335] a decision of Chancellor Boyd, we find an exposition of the reasons for the ban on contingent fees:

> The confidential relation between lawyer and client forbids any bargain being made by which the practitioner shall draw a larger return out of litigation than is sanctioned by the tariff and the practice of the Courts. Especially does the law forbid any agreement for the lawyer to share in the proceeds of a litigated claim as compensation for his services. Such a transaction is in contravention of the statute relating to champerty, and it is also a violation of the solemn engagement entered into by the barrister upon his call to the Bar.
>
> The effect of the agreement first made is that the solicitor and client embark in a joint speculation to be presented in the Court for their joint advantage – the client bringing in his claim for injuries and the lawyer contributing his skill and service. When the professional man becomes a covert co-litigant instead of an independent adviser, many are the temptations to secure success by unworthy means. But I need not dwell on the ethical aspects; enough that the solicitor's action is contrary to law and in violation of his oath of office.

Since the English criminal law brought into Upper Canada several statutes prohibiting both maintenance and champerty, they became crimes as

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[332] Solicitors' Practice Rules 1936, S.R. & O. 1936 No. 1005, as amended, r. 4(3). These rules were made by the Council of The Law Society and approved by the Master of the Rolls under the *Solicitors Act 1974*, c. 47, s. 31.

[333] The then extant law respecting property and civil rights was introduced into what is now Ontario by *An Act to repeal certain parts of an Act passed in the fourteenth year of His Majesty's Reign, intitled, "An Act for making more effectual Provision for the Government of the Province of Quebec in North America" and to introduce the English Law as the Rule of Decision in all matters of Controversy, relative to Property and Civil Rights*, 32 Geo. 3, c. 1. See, now, *Property and Civil Rights Act*, R.S.O. 1980, c. 395. The previous year, 1791, the old Province of Quebec was divided into Upper and Lower Canada (31 Geo. 3, c. 31). In 1840, these Provinces were reunited as one Province under the name of the Province of Canada (3 & 4 Vict., c. 35). Finally, the Province of Canada was divided into the Province of Ontario and the Province of Quebec by s. 6 of *The British North America Act, 1867*, 30 & 31 Vict., c. 3 (U.K.).

[334] See, for example, *O'Connor v. Gemmill* (1899), 29 O.R. 47 (Div. Ct.), and *Re Solicitors, Clark v. Lee* (1905), 9 O.L.R. 708 (Master S.C.O.).

[335] (1907), 14 O.L.R. 464 (H.C.J.), at 465.

well as civil wrongs.[336] However, the Parliament of Canada has abolished common law crimes, which included maintenance and champerty.[337]

In 1909, *The Law Reform Act, 1909*[338] was enacted in Ontario. It instituted various rules respecting the making and enforcement of agreements between lawyers and clients. Section 36 of the Act, which was taken from the English *Attorneys and Solicitors Act, 1870*,[339] was virtually identical to the present section 30 of the *Solicitors Act*.

It is evident that section 30 imposes more stringent conditions on the making of agreements than does the common law. While some courts in other jurisdictions would allow lawyers to advance disbursements[340] and, in some cases, to agree to be paid costs only in the event of success,[341] in Ontario such arrangements are prohibited.[342]

c. *Contingent Fees in Other Canadian Jurisdictions*

While, in the United States, the contingent fee agreement has been an established method of financing litigation since the nineteenth century,[343] in Canada, acceptance of such arrangements has been a recent innovation.

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[336] In 1800, the Legislature of Upper Canada affirmed by statute the criminal law of England as it existed on September 17, 1792: 40 Geo. 3, c. 1. For a discussion of maintenance and champerty before their abolition as crimes, see Harvey (ed.), *Tremeear's Annotated Criminal Code Canada* (5th ed., 1944), at 47-49.

[337] *Criminal Code*, S.C. 1953-54, c. 51, s. 8.

[338] S.O. 1909, c. 28.

[339] 33 & 34 Vict., c. 28, s. 11 (U.K.).

[340] *Clyne v. New South Wales Bar Association, supra*, note 42.

[341] *Sievwright v. Ward, supra*, note 41.

[342] A contract by which a solicitor is to receive a non-percentage fee only in the event of success in the action clearly is prohibited by s. 30. An agreement by which the lawyer is to advance the disbursements of an action and to seek their repayment only if the action is successful also is prohibited, although this prohibition is not apparent from a reading of s. 30 alone. It becomes clear when ss. 17*(b)*, 18, and 30 are read together. Section 17*(b)* defines "services" to include "fees, costs, charges and disbursements". Section 18(1) is concerned with the making of "an agreement in writing . . . respecting . . . past or future services".

[343] Approval by the United States Supreme Court was given in *Wylie v. Coxe*, 56 U.S. 415 (1853), and *Taylor v. Bemiss*, 110 U.S. 42 (1883). The American Bar Association gave its approval to contingent fee agreements when it drafted its first Code of Ethics in 1908. Various theories have been suggested to account for the willingness with which contingent fees were embraced in the United States: see, for example, Radin, *supra*, note 312, at 70.

In the United States, contingent fee arrangements have been employed in various kinds of action. Their most prevalent use is in personal injury litigation, but they also have been relied upon in other types of proceeding, including workmen's compensation suits, contract actions, collection suits, shareholders' derivative actions, bankruptcy proceedings, and tax cases. For reasons of public policy, contingent fee agreements cannot be used in divorce actions, criminal cases, and where payment is dependent on achieving a favourable decision by a legislative body or by an executive department of a government: see MacKinnon, *supra*, note 85, at 25-28 and 45-50.

In all Canadian jurisdictions except Ontario, various forms of contingency arrangement are now permitted, either by statute, rule, case law, or as a matter of practice.[344] While it is not proposed to describe the approach of each jurisdiction in detail, we shall discuss the general trends.[345]

The most restrictive approach has been taken in New Brunswick. Under section 72.1(3) of the *Judicature Act*,[346] contingent fee agreements may be made only with a client "who is, or who foreseeably will be, unable to pay for the amount and manner of payment of the future services, fees, charges and disbursements to be rendered and incurred" by the lawyer. In imposing this prerequisite, New Brunswick is unique among jurisdictions allowing contingent fee arrangements. In New Brunswick, contingent fee agreements must be filed with the Registrar of the Court of Queen's Bench.[347] Unless such an agreement is approved as fair and reasonable, and meets certain formal requirements, it is "null and void and is not capable of enforcement by any party thereto".[348] The Registrar has a discretion to vary, modify, or disallow any of the provisions of the agreement.

If the lawyer is successful in accomplishing the matter for which he has been retained, and becomes entitled to payment pursuant to the contingent agreement, the Registrar nonetheless may review the agreement and disallow any amounts payable thereunder, if such amounts "have become substantially larger . . . than originally anticipated by the parties . . . to the extent that the amounts payable thereunder are no longer fair and reasonable in all of the circumstances".[349]

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[344] See *The Law Society Act*, R.S.M. 1970, c. L100, s. 49, and The Queen's Bench Rules, Man. Reg. 26/45, r. 638A; *Judicature Act*, R.S.A. 1980, c. J-1, s. 46, and Supreme Court Rules, Alta. Reg. 390/68, rr. 615-618; *Barristers and Solicitors Act*, R.S.B.C. 1979, c. 26, s. 99; Northwest Territories Rules of Court, rr. 553-557; *An Act respecting the Barreau du Québec*, R.S.Q. 1977, c. B-1, s. 126(2), and By-law 1 of the Bar of the Province of Quebec, arts. 86 and 87; O.C. 3364, (1967) 99 O.G. 7245, continued in force by Décret 1909-80, (1980) O.G. II 3541; *Judicature Act*, R.S.N.B. 1973, c. J-2, s. 72.1, as enacted by S.N.B. 1978, c. 32, s. 32; Nova Scotia Civil Procedure Rules, rr. 63.17-63.20; and Prince Edward Island Rules of Court, rr. 63.17-63.20. In Saskatchewan, see *Speers v. Hagemeister* (1975), 52 D.L.R. (3d) 109 (Sask. C.A.). In Newfoundland, this issue has not been addressed by legislation or by the Law Society of Newfoundland. From inquiries made of the Law Society, we understand that contingency arrangements exist, as a matter of practice, but only to a limited degree.

[345] It is interesting to observe that no jurisdiction has abolished maintenance and champerty as civil wrongs: see Minish, "The Contingent Fee: A Re-Examination" (1979), 10 Man. L.J. 65. Where contingent fees have been allowed, this seems contradictory, as the prohibitions against contingent fees are rooted in these common law wrongs. At first blush, one therefore would have thought that the abolition of maintenance and champerty would follow logically from a decision to permit contingent fee arrangements. A possible explanation for this apparent anomaly may be that, to the extent that maintenance and champerty may be considered to involve an element of incitement ("stirring up litigation"), it would be justifiable to discourage such conduct by preserving them as civil causes of action.

[346] *Judicature Act*, R.S.N.B. 1973, c. J-2, as am. by S.N.B. 1978, c. 32, s. 32, enacting s. 72.1.

[347] *Ibid.*, s. 72.1(5).

[348] *Ibid.*, s. 72.1(9).

[349] *Ibid.*, s. 72.1(8).

Comprehensive regulation of contingent fees has been instituted in Alberta, Manitoba, Prince Edward Island, the Northwest Territories, and Nova Scotia. Each of these jurisdictions permits percentage contingent fee agreements. The contract must be made in writing and must be filed with a court official within a specified number of days after it has been signed. Except for Manitoba, in each of these jurisdictions the content of the agreement is prescribed. A client is entitled to secure a review of the reasonableness and fairness of an agreement by either a judge or a court official, who has the power to vary, modify, or disallow the agreement. If the agreement is not allowed, or if the lawyer fails to comply with any of the rules governing contingent fees, the ordinary taxation procedure and standards determine the proper remuneration.

In British Columbia and Quebec, contingent fees are expressly permitted by statute and regulation, respectively. Section 99 of the British Columbia *Barristers and Solicitors Act* governs the making of contracts for remuneration between lawyers and clients. It provides that while "champertous contracts are prohibited . . . the taking of a fee based on a proportion of the amount recovered is not, in itself, champertous within the meaning of this subsection".[350] As a result, contingent fee agreements are allowed and are governed by certain rules set out in the section. The agreement must be in writing and is subject to review by the British Columbia Supreme Court on the application of the client. If the contract is not fair and reasonable, the Court may either modify it or order its cancellation, in which case there will be a taxation as if no contract had been made.

Contingent fees are permitted in Quebec pursuant to articles 86 and 87 of By-law 1 of the Regulation of the Bar of Quebec.[351] In collection cases, a lawyer may agree in writing not to charge his client any costs, fees, or disbursements in return for a percentage of the amount recovered, provided that the stipulated percentage is in accordance with a specified minimum scale. In other kinds of case, a lawyer and client are permitted to agree in writing to the payment of an "extrajudicial" fee that is not to exceed thirty percent of the amount collected, whether as a result of a judgment or settlement.[352] There are no provisions concerning the filing of fee agreements, the effect of non-compliance with the rules governing such agreements, or whether review of an agreement is available.

In Saskatchewan, the use of contingent fees has been sanctioned by the courts. In *Speers v. Hagemeister*,[353] the Court of Appeal held that, while no

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[350] *Barristers and Solicitors Act, supra*, note 344, s. 99(5).

[351] Articles 38, 86, 87, and 89 of By-law 1 have been continued in force by Décret 1909-80, (1980) O.G. II 3541.

[352] "Extrajudicial costs" are defined in s. 1 of *An Act respecting the Barreau du Québec, supra*, note 344, as "fees or costs, whether provided for in the tariff or not, which an advocate may charge for professional services or in addition to judicial costs, and which arise from the practice of the profession of advocate". "Judicial costs", by contrast, are defined as "costs provided for in the tariff, and taxable by the competent officer of the court".

[353] *Supra*, note 344. See, also, *Deck v. Rody* (1977), 2 C.P.C. 348 (Sask. Q.B.); *Hleck v. Manz*, [1977] 2 W.W.R. 557 (Sask. Dist. Ct.); and *Smulan v. Katzenback*, [1980] 1 W.W.R. 400, 18 C.P.C. 67 (Sask. Q.B.).

specific rule or statutory provision addressed the issue, contingent fees were permissible, provided that they were not champertous, and that they were fair and reasonable. The Court indicated that its willingness to allow such arrangements was based on a belief that, otherwise, an impecunious litigant might not be able to secure the services of a lawyer.[354]

Apparently little use has been made of contingent fee arrangements in the jurisdictions where they have been allowed.[355] The only published empirical data, which comes from Manitoba, indicates that, from 1956 to November 1978, only 115 contingent fee contracts were filed.[356] It is interesting to note, however, that a 1975 Report to the Law Society of Manitoba[357] concluded that such arrangements do perform a valuable function in Manitoba. The tone of the Report suggested that contingent fee agreements are being used, although no statistical information was provided.

In permitting contingent fee agreements, there is a range in the degree of control imposed, from the generality of the "reasonableness" standard established by the Saskatchewan Court of Appeal, to the detailed codes implemented in New Brunswick, Alberta, Nova Scotia, and Prince Edward Island. The fact that these agreements are subject to supervision is a recognition that they involve a risk of conduct that may be detrimental to the interests of clients. However, that such arrangements are nonetheless sanctioned indicates a belief that, on balance, the advantages outweigh the dangers which, in any event, may be prevented by proper measures.

d. Contingent Fees in Class Actions: the Policy Arguments

An examination of the relevant literature concerning the propriety of contingent fee agreements in individual actions reveals that no startlingly new arguments are presented either in opposition to, or in support of, such arrangements. There is a familiarity in the recitation of purported advantages and disadvantages. A convenient summary of the opposing arguments is presented in the following passage:[358]

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[354] *Speers v. Hagemeister, supra*, note 344, at 114.

[355] See Province of Ontario, Ministry of the Attorney General, *Report of the Professional Organizations Committee* (1980), at 209.

[356] See Minish, *supra*, note 345, at 69. The Commission made inquiries respecting the practice in Alberta and Nova Scotia. The responses revealed that few agreements have been filed with the courts in those provinces. In Alberta, in rural judicial districts, contingent fee agreements are used very rarely. By contrast, in the Calgary Judicial District, 78 agreements were filed in 1978, 128 in 1979, and 160 in 1980. In Nova Scotia, excluding Halifax, the use of contingency agreements has been negligible. Unfortunately, we received no information respecting the practice in Halifax.

[357] *Report to the Law Society of Manitoba [by the] Special Committee on Contingency Agreements* (February 7, 1975).

[358] MacKinnon, *supra*, note 85, at 4-5. See Arlidge, *supra*, note 312, at 394-95; Williston, "The Contingent Fee in Canada" (1967), 6 Alta. L. Rev. 184, at 198-200; Radin, *supra*, note 316, at 587-88; and the United Kingdom *Report of the Royal Commission on Legal Services* (Cmnd. 7648, 1979), Vol. 1, at 176-77.

> The basic objection to the contingent fee is the adverse effect it possibly may have on the performance of the bar's professional responsibilities, both in the case at hand, and more importantly, in the future. The major arguments against contingent fees are that the gamble on the outcome introduces a speculative attitude toward law practice which is inconsistent with the detachment essential to a profession and that, because of the contingency, there is an emphasis on winning which tends to reduce the lawyer's self-restraint in negotiation and trial advocacy, thereby endangering the effective operation of the adversary system of judicial administration. In addition, the financial rewards to the lawyer are so large as to encourage competitive solicitation of potential clients, impairing the professional disinterest necessary to sound advice to his client and weakening the ties between fellow lawyers which form one of the essential characteristics of a profession. Further, the lawyer acquires an interest in the lawsuit that might come between him and his client, not only concerning the amount of the fee but also over the control of the suit on such questions as whether to accept an offer of settlement. Finally, it is argued that giving the lawyer the right to finance litigation tends to motivate him to stir up lawsuits, both those that are supportable but would not be brought on the client's initiative and those that are groundless but have nuisance value, thus adding to the burdens of already overcrowded courts and contributing to an undesirable litigious attitude in the community.
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> Arguments in support of the use of the contingent fee are that its widespread use shows that it has obviously passed the pragmatic test and that no evils are discernible which can be attributed directly to its use. Its proponents maintain that it encourages able, speculative work in many areas of practice and has led to the developing use of the lawyer as an agent to support desirable social and business adjustments through his work for claimants on a contingent basis. Some argue also that it enlists the best efforts of the lawyer on behalf of his client and enables the lawyer to compete as an entrepreneur in our competitive economy, making use of his only assets – his skill, time, and office arrangements. Most important, perhaps, it is argued that no other system has been suggested which provides capable legal service to those unable to afford fees, without introducing more serious risks of destroying the independence of the profession.

The primary policy justification suggested in this excerpt is access to the courts. Contingent fees are regarded as a key to the legal system for persons whose meagre pecuniary resources will preclude them from otherwise being able to retain lawyers to protect their interests.

Another alleged advantage of contingent fees, which is not mentioned in the quoted passage, is that the availability of such arrangements may encourage timely consultation with lawyers and promote earlier, more accurate information collection by the latter.[359] It has been argued that injured persons who know that they will have to pay their lawyers only if they obtain a recovery will not hesitate to seek the assistance of lawyers, who will have an economic interest in carefully evaluating the merits of the case as soon as possible before substantial time and effort have been invested.

We need not dwell further on the purported advantages of contingent fee agreements. Of much greater concern to the Commission are the arguments that have been raised against the introduction of contingent fees. Although usually associated with the use of contingent fees in individual suits, these allegations are not necessarily restricted to that context.

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[359] See Minish, *supra*, note 345, at 75, and Williston, *supra*, note 358, at 199.

Generally, the arguments against contingent fees have the same point of departure. They assert that certain deleterious behavioural consequences will result from the acquisition by a lawyer of an interest in the action. That the lawyer does acquire an economic interest in the outcome of the suit cannot be denied. Indeed, it is the crucial aspect of a fee that is contingent upon success. One can discern the roots of these arguments in the doctrines of maintenance and champerty. Basically, it has been argued that, by allowing a lawyer to acquire a personal interest in the outcome of the action, he may be tempted to engage in misconduct, of which four specific varieties have usually been cited.

First, it has been contended that the prospect of contingent fees will cause lawyers to "stir up" litigation by encouraging clients to commence or to persist in maintaining unmeritorious actions that should not be prosecuted.[360] We do not believe, however, that it is an inevitable corollary of contingent fees that lawyers will choose to expend their efforts on unmeritorious actions. Because an unsuccessful action will produce no compensation for the lawyer, it can be argued that, instead of encouraging the initiation of unmeritorious suits, the contingent fee will have precisely the opposite result. It may well cause specious actions to be filtered out, as their slight chance of success will cause them to be rejected by lawyers. But, whatever the merits of this argument, the concern that unmeritorious class actions may be brought has been addressed specifically in the proposed Ontario *Class Actions Act* by the incorporation of the certification procedure. Moreover, in order to deal with the possibility of unmeritorious applications for certification, we have given the court a residual discretion to award costs on the certification motion. Finally, costs may be awarded where a court finds that a party has engaged in vexatious, frivolous, or abusive conduct.[361]

The second alleged abuse of contingent fees is that a lawyer's investment in the result of the action may cause him to abandon self-restraint in conducting the case and to engage in whatever tactics are necessary to achieve success. Excessive zeal for fees, it is contended, will encourage "sharp" or unethical litigation practices. In making this argument, the following types of misconduct have often been listed:[362] "building a case" by the construction of evidence; improper coaching of witnesses; use of demonstrative evidence designed only to elicit the emotions and sympathies of the jury; improper examination and cross-examination; and inflammation of damages.[363] If such abuses were inevitably to attend the use of contingent fees, it would cause the most serious prejudice to the public interest in the proper administration of justice.

At the outset, we observe that the varieties of misconduct noted above are not restricted to litigation conducted on a contingent basis. Allegations that these abuses exist have been made against lawyers in Ontario who now act for

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[360] See White, *supra*, note 327, at 294, and Minish, *supra*, note 345, at 71.

[361] See *supra*, this ch., sec. 5(a). See Draft Bill, s. 41(1)(*a*).

[362] MacKinnon, *supra*, note 85, at 200. See, also, Arlidge, *supra*, note 312, at 394, and White, *supra*, note 327, at 292.

[363] Balbulia, "Contingent Fee Contracts: Policy and Law in New Brunswick" (1971), 49 Can. B. Rev. 603, at 606.

clients on the understanding that they will be paid solicitor and client costs, regardless of the outcome of the action.

We do not doubt that the contingent nature of the fee puts economic pressure on a lawyer that is more intense than where compensation will be received in any event.[364] Whether this pressure, in fact, does produce the abuses envisaged by opponents of contingent fees has not been demonstrated empirically. Nor, of course, has the opposite been proven. In response to the argument that misconduct on the part of lawyers will result from sanctioning contingency fee arrangements, it has been observed:[365]

> Defenders of the contingent fee have argued along the following lines: A lawyer is always interested in winning his case, whatever the fee arrangement; the contingent fee is not the *cause* of evils resulting from excessive, unprofessional zeal – these abuses have always existed; remedies exist in the court and bar association disciplinary proceedings to correct them, so that it is not sound to use the contingent fee as a scapegoat.

We too believe that, in view of the critically important function of the kind of agreement proposed earlier, it would be preferable to attack abuses respecting the conduct of litigation on a case-by-case basis, should they occur. Each kind of improper conduct that is feared is either proscribed by The Law Society of Upper Canada or risks judicial disapproval. If a lawyer acting in a class action disregards his ethical obligations, he should be subject to the same disciplinary measures to which a lawyer retained on a certain fee basis would now be subject. Furthermore, it should be recalled that the proposed *Class Actions Act* preserves the inherent jurisdiction of a court to award costs as a disciplinary measure.[366]

The third alleged abuse is that contingent fees encourage the solicitation of clients by lawyers anxious to secure such agreements.[367] Solicitation may be considered to be misconduct of a somewhat different character than the

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[364] See MacKinnon, *supra*, note 85, at 201.

[365] *Ibid.*, at 200 (emphasis in original). In Radin, *supra*, note 312, at 72, it was argued that contingent fees do not necessarily lead to misconduct:

> There is no necessary and inevitable connection between improper litigation, hard bargains and solicitation on the one hand and the acquisition by a third party of an interest in a litigated case, on the other. Surely it would be more rational and sensible to say that champerty is an evil when, and only when, it leads to these evils. When it does not, it is not merely unobjectionable, but may actually serve a good purpose, as so many courts have expressly and quite justifiably found.

Referring to champerty, Fleming, *supra*, note 312, at 612, states that "[i]t has attracted special condemnation because of the *imagined* temptation for the champertous maintainer to suppress or manufacture evidence or even suborn witnesses for his own special gain" (emphasis added). See, also, Minish, *supra*, note 345, at 73; Balbulia, *supra*, note 363, at 606-07; White, *supra*, note 327, at 292; and Zander, *supra*, note 316, at 117-18.

[366] See Draft Bill, s. 41(1)(*b*).

[367] See MacKinnon, *supra*, note 85, at 202-03; Williston, *supra*, note 358, at 198-99; and Note, "Contingent Fee Contracts: Validity, Controls and Enforceability" (1962), 47 Iowa L. Rev. 942, at 942.

abuses mentioned previously. Not only does it affect the proper administration of justice, but it is thought to constitute injurious and unfair competition by members of the legal profession. In addition, solicitation does not comport with the notion of detachment believed to be inherent in professionalism.[368]

As with the other abuses, that the particular conduct can be causally related to the fact that payment is to be made on a contingency basis is difficult to demonstrate as a matter of certainty. For example, it can be argued that there is a greater incentive to solicit clients where payment is certain, as it is under the present Ontario costs regime, because the lawyer knows he will be paid, regardless of the outcome of the action. Even assuming that some credence can be given to the contention that contingent fees encourage solicitation, this abuse, like the others, can be dealt with by The Law Society of Upper Canada.

The fourth alleged abuse respecting contingent fees arises from the fact that, under certain circumstances, such an arrangement creates a conflict of interest between lawyer and client. Where lawyer and client are allowed to set the terms of a fee agreement, the lawyer's natural desire to negotiate an agreement for the maximum fee possible is in conflict with the interest of the client in obtaining the largest possible net recovery. Once the agreement is concluded and the action proceeds, the interests of client and lawyer become congruent, as the maximum recovery is the goal of each. Where the possibility of settlement is raised, however, the conflict of interest reappears in an accentuated form. In theory, any advice that a lawyer gives a client about a proposed settlement should be motivated solely by a concern for the best interests of the client. As noted earlier in our discussion of class actions in the United States, a decision to settle inevitably will affect the remuneration of the lawyer, because it can transform a possibility of reward into a certainty. As a result, the lawyer's advice may be influenced by his understandable interest in maximizing his return on his investment of time and effort.[369]

Of all the criticisms levelled at contingent fee agreements, this is the most cogent, and it has caused us the greatest concern. That there is an inherent conflict of interest where a decision in an action affects whether a lawyer is to receive remuneration, or its amount, simply cannot be denied. Moreover, where the fee is contingent and is to be determined by the application of a percentage formula, this conflict is particularly acute, as the independence of the amount of the fee from the hours worked gives a lawyer an incentive to structure the timing of the settlement in a manner that will produce the best return to him. In the United States, commentators have recognized this problem[370] and have sought to design methods of fee assessment that will both preserve the advantage of the contingent fee and avoid the effects of the conflict of interest.[371]

However, to state baldly that there is a conflict of interest between the

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[368] See MacKinnon, *supra*, note 85, at 202.

[369] See MacKinnon, *ibid.*, at 196-99, and Minish, *supra*, note 345, at 72.

[370] See Schwartz and Mitchell, *supra*, note 86, and Clermont and Currivan, *supra*, note 86.

[371] See Clermont and Currivan, *ibid.*

class lawyer and the class is by itself an uninstructive assertion. What is important is the precise nature of the conflict and whether it affects the lawyer's discharge of his responsibilities to the class. To put the matter in some perspective, it should be noted that, in Ontario, a conflict of interest may, and in fact does, arise in individual actions for damages: where a lawyer is engaged in settlement discussions that concern both the amount payable to his client as compensation and the amount of costs, there is a danger that his conduct of the negotiations, as well as his advice to the client, may be affected by his personal interest in the costs.

In making this observation, we do not suggest that the position of the lawyer in individual litigation in Ontario is identical to that of the class lawyer whose fee is dependent on success. There are two crucial distinctions between class action litigation and an individual suit. The first distinction relates to the greater intensity of the conflict of interest in class litigation where entitlement to fees is contingent. A class lawyer whose remuneration is contingent no doubt is well aware that failure means that he will receive nothing. By contrast, in an individual action in Ontario, a lawyer involved in settlement discussions that involve his costs will be paid some amount regardless of the outcome of the action. Consequently, the pressure to settle the action will be substantially reduced.

The second significant distinction is that there are fewer internal restraints in the relationship between the class lawyer and the representative plaintiff to control the dangers posed by the conflict of interest. This is caused by the difference between the personal economic stake of the plaintiff in an individual action and that of a class representative in a class action. In an individual suit, the economic interest of a client in its outcome results in a degree of interaction between lawyer and client. This interest induces a client to communicate with his lawyer, at least on a periodic basis, first, in order to articulate his objectives in the action and, later, to follow its progress and to give the lawyer instructions, when the occasion dictates. This ongoing association between lawyer and client creates some restraint on the lawyer. By contrast, in a class action, no class member, including the class representative, may have a personal economic interest sufficient to persuade him to attempt to monitor closely the behaviour of the lawyer. The absence of scrutiny, it has been suggested, removes some restraint on the predilection of the lawyer to strike a bargain that is not in the best interests of the class.[372]

In our view, where payment is contingent, the conflict of interest between the class lawyer and the class would be a serious danger if the class lawyer and representative plaintiff were permitted to conclude an agreement specifying the amount of the fee or its method of calculation and if that agreement bound the interests of absent class members. Such an agreement would allow the lawyer, when presented with an offer of settlement, to ascertain the amount of fee with complete certainty. Armed with this knowledge, the lawyer would be in a position, if he so wished, to sacrifice the interests of the class in return for the optimum fee based on his expenditure of time.

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[372] See Harvard Developments, *supra*, note 111, at 1605, and Dam, *supra*, note 152, at 57-59.

As we have explained, the type of agreement permissible under our proposals would not allow the lawyer and representative plaintiff to enter into a binding contract respecting the amount of a fee or establishing the method by which the fee is to be calculated. Instead, in every case, the class lawyer's remuneration would be determined by a judge who, we anticipate, would engage in the same kind of analysis now employed in the taxation of solicitor's bills, except that the fee would have to include an increment to compensate the lawyer for undertaking the litigation on the basis that he would not receive any remuneration if the class action was unsuccessful. We shall say more about this additional amount later.[373] In any event, a class lawyer presented with a settlement offer would know only that he will receive remuneration that is to be calculated by the court. He would be unable to recommend a course of action respecting settlement, anticipating exactly what his remuneration would be. We believe that this method of fee assessment would attenuate the conflict of interest significantly.

We recognize, however, that a requirement of judicial control will not by itself entirely nullify the conflict of interest. Faced with the prospect of settlement, a lawyer, although unsure about the amount of his eventual reward, undoubtedly will know that settlement will transform a fee that is dependent upon a favourable result into a certainty. Success in litigation is never assured. Hence, a fear of receiving no remuneration could create an economic pressure to acquiesce in a settlement offer. If a class lawyer were empowered to terminate the class action unilaterally, there would be a danger that his interest in securing a fee would cause him to agree to settle without proper regard for class members. Under the proposed *Class Actions Act*, however, any settlement or discontinuance of an action commenced under the Act must receive the prior approval of the court, which will determine whether the agreement is in the best interests of the class.[374] We believe that the incorporation of this measure will prevent the conflict of interest from operating to the detriment of class members.

(c) Costs Rules in Individual Proceedings

We turn now to consider the costs rules that should apply as between the individual class members and the defendant in proceedings to determine individual questions. The class action procedures drafted or influenced by Professor Williams provide that, in individual proceedings, class members and the defendant are subject to the same liability for costs as parties in individual actions, and that the defendant has the same right to pay money into court as he does in an individual action.[375]

The implementation of the normal party and party costs rule, together with allowing discovery by and against individual class members, was

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[373] See *infra*, this ch., sec. 5(d)(ii).

[374] See *infra*, ch. 20, sec. 5.

[375] Williams' Model Act, *supra*, note 255, s. 9(5); Williams Combines Class Actions, *supra*, note 61, s. 9(5); Bill C-42, *supra*, note 65, s. 39.21(*a*); Bill C-13, *supra*, note 65, s. 39.19(*a*); and South Australia Draft Bill, *supra*, note 241, s. 9(5).

proposed by Professor Williams in order to meet the objection that, under the existing law, a defendant can neither obtain discovery of absent class members nor recover costs against them if they fail to establish their rights to participate in the class recovery.[376] While we do not fully accept Professor Williams' recommendations respecting discovery at this stage of a class action,[377] we find his proposals concerning the costs of individual proceedings acceptable, albeit for different reasons.

The determination of the common questions in favour of the class is a benefit that the class action has conferred on the class as a whole. By contrast, proceedings to determine outstanding liability issues or the amount of relief owed to particular class members are concerned solely with individuals. At this juncture, the nature of the class action alters. Because hitherto passive class members are required to take measures to obtain relief, the representative character of the class action diminishes and the action increasingly resembles an aggregation of small trials that are confined to narrow issues. It was to allow the action to proceed as a class action, and to resolve common issues on behalf of the class, that we recommended replacement of the existing costs rules with new rules at the certification and common question stages. In our view, after the common questions have been determined, the major policy reason for the abrogation of the normal costs rules no longer applies. We believe, therefore, that the usual costs rules should govern individual proceedings.

The policy consideration favouring the institution of the party and party costs rule in individual proceedings is that it would perform the same cautionary, deterrent function that it now does in individual actions. While, as a general rule, we have sought to facilitate the bringing of class actions, we nonetheless are concerned that, after the common questions have been decided in favour of the class, class members might advance specious claims for monetary relief. In addition, the "two way" costs rule would deter defendants from setting up unmeritorious defenses.

It will be recalled that, when we discussed the issue of allowing discovery in individual proceedings,[378] we analogized to the *Small Claims Courts Act*[379] and the *Provincial Court (Civil Division) Project Act*,[380] because these statutes are concerned with proper procedures for the resolution of disputes involving small amounts. In the Rules of the Provincial Court (Civil Division),[381] we find costs rules, including a Tariff of Costs and a Tariff of Fees, that are deemed to be appropriate where claims are equal to or less than $3,000. Special costs rules include certain procedures governing payment into court and offers to settle.[382] Presumably, these rules and procedures are designed to

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[376] Williams Combines Class Actions, *supra*, note 61, at 37, and 81-82.

[377] See *supra*, ch. 16, sec. 5(c).

[378] *Ibid.*

[379] R.S.O. 1980, c. 476.

[380] R.S.O. 1980, c. 397.

[381] R.R.O. 1980, Reg. 806.

[382] *Ibid.*, rr. 43, 44, 51, and 58.

be consistent with the statutory aim of developing "simplified procedures and . . . methods for making civil remedies more accessible and reducing delays".[383] The goal of affording access to the judicial system for persons with meritorious claims is also one of our fundamental objectives.[384] In light of this similarity of underlying policy, we recommend that the costs provisions of the rules made under the *Provincial Court (Civil Division) Project Act* should govern individual proceedings involving claims of $3,000 or less and, in addition, that their application should not be restricted to class actions brought in The Municipality of Metropolitan Toronto.[385] We further recommend that the costs provisions of the *Judicature Act*, and the Supreme Court of Ontario Rules of Practice, should govern individual proceedings involving claims of more than $3,000.[386]

As a result of these recommendations, the costs rules in individual proceedings will resemble those in individual actions. Thus, in a dispute with a class member, a defendant may make a payment into court or request an order for security for costs. If the class member has obtained the services of a lawyer, whether the class lawyer or another, he will be obliged to pay his solicitor and client costs, regardless of the outcome of the adjudication, although, if he is successful, he normally will obtain a partial indemnity through an award of party and party costs. Depending on the size of the claim, costs will be taxed according to the Rules of the Provincial Court (Civil Division) or the Supreme Court of Ontario Rules of Practice.

(d) Operation of the Proposed Costs Regime

In a previous section of this chapter, we stated our view that the enactment of class action legislation will be an exercise in futility unless the present costs rules are replaced by a new costs regime. Three major elements constitute the costs regime that we have recommended for the proposed *Class Actions Act*. The first is a "no way" costs rule, which provides that, generally, party and party costs cannot be awarded at certification or at the common questions stage of a class action. To this general rule, we have proposed two exceptions. The first applies only on the certification hearing, and allows a court to award costs where it would be unjust to deny costs to a successful party. The second exception applies at any stage of an action brought under the *Class Actions Act*, and allows a court to award costs in the event of vexatious, frivolous, or abusive conduct on the part of either of the parties.

The second critical element is that a class lawyer and a representative plaintiff will be permitted to make an agreement in writing stipulating that the lawyer is to be paid only in the event of success in the action. This agreement can neither set the amount of a fee nor establish a method of calculation that is legally binding. If the class action is successful in producing a monetary recovery for all or part of the class, the amount of the

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[383] *Provincial Court (Civil Division) Project Act, supra*, note 380, s. 2.

[384] See *supra*, ch. 4, sec. 3(a)(ii).

[385] See Draft Bill, s. 46(*a*).

[386] *Ibid.*, s. 46(*b*).

fee will be calculated by a judge and deducted from the individual recoveries of the class members on a proportional basis. But even if such an agreement is not concluded, a representative plaintiff will still be able to secure reimbursement for the amount of his solicitor and client costs from a recovery. We should add that class actions seeking exclusively non-monetary relief will be subject to the costs principles that we have outlined, including those concerning the type of fee agreement that is permissible, notwithstanding that success in the action will not produce a fund from which costs may be deducted.

The third element of the costs regime is that proceedings to determine individual questions will be governed by the costs rules that now apply to individual actions.

Having described the fundamental elements of the proposed costs regime, we shall proceed to discuss how it will operate. We then shall discuss other costs rules that we believe should be included in the *Class Actions Act* in order to establish an efficacious class action procedure.

(i) The Mechanics of Calculation and Distribution of Fees and Disbursements in a Class Action Seeking Monetary Relief

In this section, we shall discuss practical considerations involved in implementing proposals respecting solicitor and client costs. These matters are relevant in cases both where the class lawyer and the representative plaintiff have entered into an agreement that no payment will be forthcoming if the action is unsuccessful and where no such agreement has been concluded and the representative plaintiff wishes to be reimbursed for his solicitor and client costs.

In most cases, after a class action is certified, it will either proceed to a trial of the common questions or be settled. If the common questions are decided in favour of the class, or if there is a settlement, where there is a court approved contingency arrangement, the class lawyer becomes entitled to receive remuneration for his efforts on behalf of the class. In such a case, we recommend that fees and disbursements should be deducted from the class recovery prior to the distribution of the shares to class members.[387] Similarly, we recommend that, where no such arrangement has been concluded, fees and disbursements should be deducted from the class recovery prior to distribution.[388] Unless deductions are made directly from the recovery, it will be very difficult, if not impossible, to ensure that fees and disbursements will be paid, for once individual class members receive their shares, it will be too difficult and expensive to force them to make contributions.

In order for this scheme to work, a global sum must be in the possession or control of the court. This will be the case where there is an aggregate

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[387] See Draft Bill, s. 45(1).

[388] *Ibid.*

assessment of monetary relief or a settlement fund. Once fees and disbursements have been determined by the judge, they can be deducted from the global amount. Then the net sum can be distributed *pro rata* to the class members. Hence, each class member will bear a proportionate share of these costs.

Where there is neither an aggregate assessment nor a settlement fund, and therefore no global amount, but nonetheless there is a favourable decision for the class on the common questions, it will then be necessary to determine the remaining issues at subsequent individual proceedings.[389] Depending on the particular nature of these issues, the outcome of these proceedings will decide whether the defendant is liable to a particular class member or the amount of the liability, or both. Regardless of which issue is determined, the result will be a decision that the defendant does or does not owe a certain amount to a particular class member. Thus, there may be a number of monetary recoveries to be paid by an unsuccessful defendant.

In such a case, the class lawyer who has succeeded on the common questions is entitled to remuneration to compensate him for his efforts on behalf of the class. At that juncture, however, there is no class recovery from which his fees and disbursements can be deducted. Although fees and disbursements can be calculated, it will be impossible to ascertain the proportional share of each class member until all individual proceedings have been completed. If individual awards of monetary relief are distributed before this determination, it will not be possible to effect the proper deductions from individual amounts in respect of fees and disbursements. Moreover, when all of the proceedings have been held and it is possible to make the necessary calculations, it will be extremely difficult to trace the class members and demand payment.

The solution to this problem is simple. We recommend that, where there are individual proceedings, the amounts for which the defendant is held liable should not be distributed to class members as they are determined. Instead, the proposed *Class Actions Act* should provide that where, in individual proceedings, the defendant is ordered to pay an amount of monetary relief to a class member, that amount should be paid into court.[390] Fees and disbursements should be calculated and deducted from the total of the individual recoveries, which then can be distributed proportionally to class members, so that each recovery will be reduced accordingly.[391]

(ii) Responsibility for the Assessment of Fees and Disbursements

In this section, we shall discuss who should be responsible for assessing fees and disbursements incurred on behalf of the class, as distinct from those incurred on behalf of individual class members.

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[389] For a discussion of individual proceedings, see *supra*, ch. 15.

[390] See Draft Bill, s. 45(2).

[391] *Ibid.*, s. 45(3).

In Ontario, the costs of any action, including the lawyer's fees, ordinarily are determined by the taxing officer. However, under the Supreme Court of Ontario Rules of Practice[392] and the Rules of Civil Procedure proposed by the Civil Procedure Revision Committee[393] a trial court may determine party and party costs, instead of leaving them to be taxed. By contrast, in the United States, attorneys' fees in class actions are determined by the court that has heard the action.[394]

When we earlier recommended that the representative plaintiff and the class lawyer should be allowed to enter into an agreement whereby the latter would be entitled to receive payment only in the event of success, we proposed that, if such an agreement were concluded, a judge should determine the amount of the payment. For reasons that we shall explain below, we also recommend that our proposal should be extended to class actions where the type of arrangement described above has not been concluded and, therefore, where the class plaintiff has the same liability for solicitor and client costs as a litigant in individual litigation.[395] In such cases, the judge who has given judgment on the common questions, or who has approved a settlement, should be obliged to determine costs in both successful and unsuccessful actions. Moreover, we recommend that, whether or not the class lawyer and representative plaintiff enter into an agreement that stipulates for payment only in the event of success, the responsibility for the assessment of fees and disbursements should not be delegated to a master.[396]

By proposing that the assessment of costs rest in the exclusive domain of a judge, we have recommended a departure from the practice followed in individual suits. There are two reasons why we believe that this change is warranted. First, the judge who has been involved in the class action will have an intimate knowledge and understanding of the proceedings and therefore he will be best able to evaluate the claim of the class lawyer for compensation. This is particularly important in a class action, because such litigation is likely to be more complex and prolonged than an individual action. Secondly, in chapter 20, we shall recommend that settlement of a class action should receive prior judicial approval. Since the amount payable to the class lawyer will be a relevant factor in assessing whether the settlement is fair and adequate from the perspective of absent class members, who will contribute to it on a proportional basis, it would be advisable to require the court to determine fees and disbursements. We believe that a combination of judicial scrutiny of settlements and judicial calculation of fees and disbursements will effectively control any danger that may be posed by the fact that the lawyer has agreed to undertake the action on a basis that he will receive no compensation if the action is unsuccessful.

Finally, with respect to the timing of the calculation of fees and

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[392] R.R.O. 1980, Reg. 540, r. 659.

[393] Williston Committee Rules, *supra*, note 22, r. 59.01(a).

[394] See discussion *supra*, this ch., sec. 3(a).

[395] See Draft Bill, s. 43.

[396] *Ibid.*, s. 44.

disbursements, we recommend that the judge should be empowered to make this determination at the conclusion of individual proceedings or at such other time and upon such terms and conditions as is considered proper.[397]

(iii) Assessment of Fees and Disbursements

a. Lawyers' Fees

We now turn to consider how lawyers' fees should be determined. When we discussed how attorneys' fees are calculated in the United States, we noted that the dominant method of assessment emphasizes the hours expended on behalf of the class by the lawyer.[398] The value of the lawyer's services is calculated and then is adjusted to reflect two factors, namely, the quality of work demonstrated in the conduct of the action, and the fact that payment is contingent on success. While this method, the so-called "*Lindy* approach", does oblige the court to follow certain prescribed steps, the calculation of attorneys' fees nonetheless involves the exercise of considerable discretion on the part of the court. In the United States, in an effort to promote consistency of approach, certain proposals to reform class action procedures have addressed the question of fee determination.[399]

The Commission, however, does not believe that it is necessary to give express instruction to the trial judge concerning how to determine the appropriate fee. We are confident that the courts will seek guidance in those cases that have delineated relevant criteria.[400]

Nevertheless, there is one aspect of fee assessment that must be addressed specifically in the proposed *Class Actions Act*. Under the kind of fee arrangement permitted by the Act, the class lawyer will receive a fee only in the event of success. If he agrees to act on this basis, the class lawyer will be assuming a risk that, after the expenditure of time and effort, no remuneration may be received. It is essential that the successful lawyer be compensated for accepting the risk of non-payment. Otherwise, lawyers very likely will refuse to act for classes on this basis and will insist on the usual solicitor and client cost arrangements, in which case potential representatives may be unable or unwilling to retain them. Alternatively, lawyers may decline to act even under the usual arrangements because they do not wish to take the chance that representative plaintiffs will be unable to pay them if the action fails. Therefore, we recommend that the *Class Actions Act* should provide that the class lawyer's fees should include an additional amount that is determined by the court to be fair and reasonable compensation to the lawyer for the risk incurred in undertaking the action on a basis of payment only in the event of success.[401]

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[397] *Ibid.*, ss. 42(4) and 43.

[398] See discussion *supra*, this ch., sec. 3(a)(ii)a.

[399] See "Proposed Federal Consumer Class Action Legislation - II", (1975) 4 C.A.R. 342, §10; U.C.C.A., *supra*, note 185, §16; and O.I.A.J. Bill S. 3475, *supra*, note 198, §3027.

[400] See *Re Solicitors, supra*, note 29, where the relevant factors are listed.

[401] See Draft Bill, s. 42(4)(*a*). See, also, South Australia Draft Bill, *supra*, note 241, s. 3(8)(*b*).

b. Disbursements

As with any other civil suit, various kinds of disbursement will have to be paid by the parties during the course of a class action. Of these, the expense of sending the necessary notices likely will be the most significant and, for this reason, we shall discuss this particular cost as a separate matter.

Other disbursements might include such matters as the expense of filing documents in the action, use of experts, and the costs associated with discovery on the common questions. In our view, the class representative alone cannot be expected to bear the ongoing costs of prosecuting the class action. Due to the anticipated greater complexity and longer duration of class litigation, disbursements will be very substantial, and often will exceed the amount of his personal stake. In some circumstances, a representative plaintiff may be prepared to pay them, in which case we recommend that he should be reimbursed from the class recovery. However, we doubt that plaintiffs will ordinarily be willing or able to pay such disbursements.

In individual suits in Ontario, lawyers often pay the disbursements of the action and seek to recover them when they bill their clients. The propriety of this practice has not been questioned. We believe that, in class actions brought under the proposed *Class Actions Act*, class lawyers similarly should be allowed, in effect, to advance the disbursements of the action on behalf of the class.

Moreover, we believe that, in many cases, unless the representative plaintiff is assured that he will not be forced to pay these costs, regardless of the outcome of the action, class actions will not be initiated, due to the reluctance of persons willing to incur this potentially great financial risk. Hence, we recommend that the lawyer and class plaintiff should be allowed to agree that the former will be entitled to reimbursement for disbursements only in a successful action.[402] We are of the view that, where such an agreement has been concluded, it should be the task of the judge to determine the amount of disbursements to which the lawyer is entitled. Finally, we believe that a lawyer who has lost the use of his money as a result of paying the disbursements should be entitled to receive interest upon it.[403] This would be particularly important to the class lawyer if the class action culminates after relatively protracted proceedings involving substantial expenditures. Otherwise, lawyers may be loath to advance the necessary sums of money.

It would be unduly complicated and difficult to calculate interest on each disbursement from the date upon which it is made. A fair and efficacious way of dealing with this practical problem is suggested in the approach of the *Judicature Act*[404] to the calculation of pre-judgment interest on special damages. Where a person is entitled to interest, section 36(4) requires that it be "calculated on the balance of special damages incurred as totalled at the end of each six month period" following the giving of written notice to the

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[402] See Draft Bill, s. 42.

[403] *Ibid.*, s. 42(4)(*b*).

[404] R.S.O. 1980, c. 223, ss. 36 and 37.

person liable. We believe that a similar approach should be adopted in the proposed *Class Actions Act*. Accordingly, we recommend that interest on disbursements should be calculated on the balance of disbursements incurred, as totalled at the end of each six month period following the date of the agreement between the lawyer and client.[405]

(iv) Notice Costs

a. Jurisdictions Other Than Ontario

In chapter 13, we explained that it may be necessary to send various notices to some or all of the class members in the course of an action brought under the proposed *Class Actions Act*. In that chapter, we made recommendations intended to minimize the expense and administrative burden of notice. In light of these proposals, we believe that the costs of notice will be a less prominent consideration under the proposed *Class Actions Act*[406] than it is under Rule 23 of the United States Federal Rules of Civil Procedure where, in class actions seeking damages, individual post-certification notice must be given to identifiable class members.[407] Nevertheless, to the extent that any kind of notice is given at any stage of an action, costs inevitably will be incurred. Thus, the question of notice costs must be addressed.

In examining the issue, two questions should be considered. First, if the court orders that notice should be given to the class, who is to pay the initial costs of sending it? Secondly, regardless of who pays initially, who should bear the ultimate cost?

It will be recalled that, as a result of the decision of the United States Supreme Court in *Eisen v. Carlisle & Jacquelin*,[408] it has been established that Rule 23(c)(2) requires individual notice to be given to all class members who can be identified with reasonable effort and that the class plaintiff must bear the expense. The *Eisen* case settled only the question of which party should pay the initial costs of notice, but did not deal with where the ultimate responsibility for this burden should lie. There have been statements by commentators that notice costs are recoverable by the prevailing party in the class action when the costs of the action are taxed.[409] This position, while perhaps justifiable as a matter of policy, has not received express judicial approval.[410] Where cases are terminated by settlement, the costs of post-

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[405] See Draft Bill, s. 42(4)(*b*).

[406] *Ibid.*, ss. 16, 17, and 18.

[407] See discussion *supra*, ch. 13, sec. 2.

[408] 417 U.S. 150, 94 S. Ct. 2140 (1974). See discussion *supra*, ch. 13, sec. 2(a)(i).

[409] See Miller, "Problems of Giving Notice in Class Actions", 58 F.R.D. 313 (1973), at 323, and Newberg, *supra*, note 83, Vol. 2, §2375, at 56-57.

[410] But see *obiter dicta* in *Re Nissan Motor Corp. Antitrust Litigation*, 552 F.2d 1088 (5th Cir. 1977), at 1103, and *Chevalier v. Baird Savings Association*, 72 F.R.D. 140 (E.D. Pa. 1976), at 151.

certification notice usually are reimbursed from the recovery fund.[411]

A number of the existing and proposed class action procedures that we have reviewed have dealt with the question of post-certification notice costs. The Uniform Class Actions Act,[412] while appearing to codify the present law respecting such costs,[413] authorizes the court to supervise advancement by the class lawyer of "costs and litigation expenses", which presumably would include notice costs, where they "cannot reasonably and fairly be defrayed by the representative parties or by other available sources".[414] Section 904 of the New York Civil Practice Law and Rules provides that, as a general rule, the representative plaintiff should pay for post-certification notice; however, the court is given a discretion to require the defendant to pay the expense "if justice requires", and to apportion it between the representative plaintiff and the defendant "in proportion to the likelihood that each will prevail upon the merits".[415] The class action proposals of the Office for Improvements in the Administration of Justice of the United States Department of Justice,[416] while requiring that notice be sent after certification in a class compensatory action, fail to address the matter of payment.

Of the class action mechanisms drafted or influenced by Professor Williams,[417] only the South Australia Draft Bill and the Model Consumer Class Actions Act deal with the costs of post-certification notice.[418] Each provides that, if the court decides to order that notice be given to the class, it has a discretion to "order that the defendant give the notice or pay the cost of giving the notice".[419] In view of the fact that, under these proposals, a defendant cannot recover party and party costs if he defeats a class action at trial, a defendant who is ordered to bear the initial costs of that notice would

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[411] See Manual, *supra*, note 116, §1.45, at 73, and Newberg, *supra*, note 83, Vol. 3, §6990g, at 1296-99.

[412] U.C.A.A., *supra*, note 185.

[413] *Ibid.*, §§7(f) and 14(c).

[414] *Ibid.*, §17(b).

[415] N.Y. Civ. Prac. Law §904(d)I (McKinney).

[416] O.I.A.J. Bill S. 3475, *supra*, note 198, §3013(e), and O.I.A.J. Bill H.R. 5103, *supra*, note 198, §3022(e)(2).

[417] Williams' Model Act, *supra*, note 255; Williams Combines Class Actions, *supra*, note 61; South Australia Draft Bill, *supra*, note 241; Bill C-42, *supra*, note 65; and Bill C-13, *supra*, note 65.

[418] Bill C-13, *supra*, note 65, s. 39.14, and Bill C-42, *supra*, note 65, s. 39.16, simply provide that "the Court may by order direct that notice of the proceedings be given to members of the class in question". It is not clear whether the representative plaintiff must give notice and pay for it. However, it should be noted that, in a successful class action, the reasonable solicitor and client costs, which would include all disbursements in the course of the action, would constitute a first charge against the damages awarded to the class: see Bill C-42, s. 39.2(2), and Bill C-13, s. 39.18(2).

[419] South Australia Draft Bill, *supra*, note 241, s. 5(2)(*b*), and Williams' Model Act, *supra*, note 255, s. 5(2)(b).

bear it ultimately.[420] Under the Quebec class action legislation,[421] a representative plaintiff may apply to the Fonds to defray the cost of post-certification notice.[422]

The question of the cost of post-judgment, as opposed to post-certification, notice has been addressed in few class action procedures. The earlier O.I.A.J. proposal, Bill S. 3475,[423] provides that, in a public action, the cost of notice of the opportunity to file claims against the public recovery fund is to be paid out of the Fund.[424] Both O.I.A.J. proposals require a defendant, after a finding of liability in a class compensatory action, to give notice, at his own expense, of subsequent proceedings to determine individual claims.[425]

The Quebec class action provisions envisage subsequent proceedings to distribute a collective recovery and to determine individual claims where the former is not feasible. While notice must be given to class members in each case, the Act does not stipulate who is to give this notice or to pay for it initially.[426] However, it does provide that, where there is a collective recovery, notification costs will be deducted from the fund.[427]

While post-judgment notice is required by the Model Consumer Class Actions Act and the South Australia Draft Bill, it is not clear who is to distribute the notice or pay for it. Professor Williams anticipated that, in certain circumstances, it might be appropriate to impose responsibility for distribution on the defendant.[428]

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[420] In the commentary to his consumer proposal, Professor Williams justified granting the court this discretion by the following argument:

> Section 5(2)(b) authorizes the court to order the defendant to bear the cost of notice to the class. The defendant has an interest in the question of notice as he will normally have to pay the cost if the action eventually succeeds. Except in this limited sense, whether notice is given to the class or not does not really concern the defendant as judgment in the action will bind members of the class whether they received notice or not. This provision should help discourage a defendant from pressing the court to direct elaborate notice when the motive is not to protect class members but to embarrass the plaintiff with the expense of the notice. If the defendant insists on notice, the court may make him pay the price.

See Williams Consumer Class Actions, *supra*, note 54, at 79.

[421] Quebec Act, *supra*, note 213.

[422] C.C.P., *supra*, note 214, arts. 1005(*c*) and 1046.

[423] *Supra*, note 198. O.I.A.J. Bill H.R. 5103, *supra*, note 198, neglects to include an express requirement that notice be given of a public recovery fund. It is suggested that this omission was inadvertent, as §3005(b) provides that "[n]otice may be by publication and such other means as the court or Director determines are reasonably likely to inform persons eligible to file claims".

[424] O.I.A.J. Bill S. 3475, *supra*, note 198, §3007(b).

[425] O.I.A.J. Bill S. 3475, *ibid.*, §3014(c), and O.I.A.J. Bill H.R. 5103, *supra*, note 198, §3012(b).

[426] C.C.P., *supra*, note 214, arts. 1030 and 1046.

[427] *Ibid.*, art. 1035.

[428] See Williams Combines Class Actions, *supra*, note 61, at 183:

b. Proposals for Reform

As a general proposition, we believe that whoever benefits most from the distribution of a notice should be called upon to bear its expense. In our view, post-certification notice and post-judgment notice serve the interests of the entire class. Therefore, as a matter of principle, the class representative, on behalf of the class, should pay for the cost of these notices, for which he should be entitled to be reimbursed from the recovery if the class action is successful in securing monetary relief. However, as with other disbursements, we recognize that, in most class actions, it is likely that a class representative will be reluctant or unable to incur this expense. Accordingly, we recommend that the class lawyer and the representative plaintiff should be entitled to agree that the lawyer will advance the initial costs, pursuant to an agreement that he will be reimbursed only in the event of success in the action.

Unlike post-certification notice and post-judgment notice, general notice may be used in a class action for a variety of purposes and may benefit either the class members or the defendant. Hence, a rule allocating the cost exclusively to the class representative or to the defendant would not be appropriate. Accordingly, we recommend that the court should be given a discretion to determine by whom the costs of general notice should be paid, as well as the power to apportion the cost between the parties.[429]

The question of the cost of notice of a proposed settlement similarly does not lend itself to resolution by a statutory directive that places responsibility upon either the representative plaintiff or the defendant alone. In the United States, the cost of sending notice of settlement usually is determined by agreement between the parties.[430] Only the Uniform Class Actions Act has addressed this issue, providing that the cost of settlement notice shall be governed by the agreement of the parties, unless the court otherwise orders.[431]

At first blush, it may appear attractive to require that the cost of notice of a settlement should be deducted from the settlement fund. In our view, however, notice of settlement can be distinguished from post-certification notice and post-judgment notice. To the extent that the latter types of notice confer benefits on the class, there is a policy reason in favour of requiring the

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Notice to the class will be necessary where the identity or entitlement of the members cannot be established without their personal participation. The form and extent of distribution of the notice will be determined by the particular circumstances of the case. Whether the court will direct that notice be given individually to all the members or merely to a random sample or whether it will regard notice by advertisement in the media as sufficient, or perhaps order a combination of individual notice and advertisement, should be governed by the size of the class, the amounts of individual claims and the cost of notice. The fact that class members are identified is an important consideration. For instance, if the defendant is in regular correspondence with class members, as in the case of a department store sending monthly accounts to charge customers, the court might order it to enclose a notice with the next account.

[429] See *supra*, ch. 13, sec. 4(c). See Draft Bill, s. 18(4).

[430] See Newberg, *supra*, note 83, Vol. 2, §2620, at 240-41.

[431] U.C.A.A., *supra*, note 185, §12(e).

class to pay for them in a successful action, particularly in view of the fact that no party and party costs can be recovered from the defendant. By contrast, settlement notice cannot be considered to benefit only the class. A settlement is an agreement that is advantageous to the class and to the defendant, as it creates a recovery for the former and grants peace to the latter. The perceived values of those benefits are reflected in the terms of the settlement.

We believe that the parties should be allowed to negotiate who will pay the cost of settlement notice, just as they are permitted to determine the other terms of the settlement, subject, however, to the supervisory authority of the court to approve the settlement.[432] Thus, if the arrangements for the payment of notice are unfair to the class, the court will be able to reject the settlement. Hence, we recommend that the proposed *Class Actions Act* should provide that the cost of notice of settlement may be determined by the parties, subject to the overriding discretion of the court to order otherwise.[433]

(v) The Costs of Distributing an Aggregate Award

Under the proposed *Class Actions Act*, there may be two types of proceeding following the determination of the common questions in favour of the class. First, if the court has ordered an aggregate assessment of monetary relief, there will be proceedings to distribute the aggregate award. Secondly, where the court is unable to order an aggregate assessment of the total amount of monetary relief to which the class is entitled, there will be individual proceedings to determine the outstanding issues. We already have recommended that the party and party costs rule of individual actions should govern proceedings to determine individual issues.[434] In this section, we shall discuss the costs rules that should govern the distribution of an aggregate award.

Where there is an aggregate assessment, costs inevitably will be involved in distributing to the class members their shares of the recovery, regardless of how distribution is to be effected. If, for example, a direct distribution is ordered, expenses will be incurred in mailing cheques, unless each cheque can be included with a mailing that is sent regularly to class members. Where the court orders that the entitlement of persons to shares of an aggregate award should be established by a proof of claim procedure, expenses will be incurred in designing and testing the procedure, giving the requisite notice, and administering the distribution.[435]

In preceding chapters, we have explained that these procedures differ in a fundamental way from proceedings to determine individual questions, in that

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[432] See discussion *infra*, ch. 20.

[433] See Draft Bill, s. 36(2).

[434] See *supra*, this ch., sec. 5(c).

[435] For a discussion of the various methods by which an aggregate award may be distributed, see *supra*, ch. 14, sec. 3(c).

they are not adversarial in character.[436] In view of their non-adversarial nature, it would be inappropriate to institute the "two way" costs rule that we have recommended to govern individual proceedings.

Few of the existing or proposed class action procedures have addressed this question. The Uniform Class Actions Act provides that "[t]he reasonable expense of identification and distribution shall be paid, with the court's approval, from the funds to be distributed".[437] The class action provisions of the Quebec *Code of Civil Procedure* also provide for the deduction of expenses from an aggregate recovery.[438] Both O.I.A.J. proposals provide that, in a public action, the "administrative expenses" incurred in carrying out the distribution of the public recovery are to be paid out of a public recovery fund.[439] In addition, O.I.A.J. Bill S. 3475 expressly stipulates that the costs of notice are to be borne by the fund.[440]

In our view, the costs associated with the distribution of an aggregate award are an integral part of its distribution. We have given the court a discretion to deal with distribution generally, and we believe that the question of distribution costs should receive identical treatment. Hence, we recommend that the costs of distributing an aggregate award, including the cost of notice and payment of an appropriate fee to the person or persons administering the distribution, should be left to the discretion of the court. We further recommend that where the court orders these costs to be paid, they should be deducted from the aggregate award.[441] This would ensure that, consistent with the fundamental "no way" costs rule, a court could not order the unsuccessful defendant to pay the expense.

We envisage that our proposals, if implemented, would be significant in two circumstances. First, if a class representative has supervised and administered the allocation of an aggregate award, he would be entitled to apply to the court to be reimbursed for any expense that he has incurred and for compensation for his time. Where the class lawyer has undertaken this responsibility, it would constitute yet another facet of his services on behalf of the class, for which he would be entitled to apply to the court for remuneration from the fund.

Secondly, it will be recalled that, in the case of an aggregate award, the court may order a *cy-près* distribution.[442] Where a *cy-près* distribution is not feasible or where a residue remains after such a distribution, the court may order that the undistributed residue be forfeited to the Crown or returned

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[436] See *supra*, chs. 14, 15, and 16.

[437] U.C.A.A., *supra*, note 185, §15(c)(2).

[438] C.C.P., *supra*, note 214, art. 1035.

[439] O.I.A.J. Bill S. 3475, *supra*, note 198, §3007(a), and O.I.A.J. Bill H.R. 5103, *supra*, note 198, §3005(a)(2).

[440] O.I.A.J. Bill S. 3475, *supra*, note 198, §3007(b).

[441] See Draft Bill, s. 47.

[442] See *supra*, ch. 14, sec. 3(c)(v)g.

unconditionally to the defendant. If a class member were to wish to make submissions regarding this matter, he would have to intervene in the action. Earlier, we recommended that, in order to ensure the fair and adequate protection of the interests of the class, or for any other appropriate reason, the court at any time should be empowered to permit one or more members of the class to intervene upon such terms and conditions as it considers proper. In setting the terms to be imposed upon the class member, the court should consider the matter of costs. Because intervention regarding any of these proposed kinds of disposition of an aggregate award might not benefit individual class members directly, but might enure only to the benefit of the class as a whole, a class member should be entitled to apply for the costs of his intervention from the award. Accordingly, we recommend that, in permitting intervention, the court should be empowered to set terms and conditions respecting costs.[443]

(vi) Miscellaneous

a. Security for Costs

Rule 373 of the Supreme Court of Ontario Rules of Practice allows the court, in a number of circumstances, to order a plaintiff to provide security for the costs of the defendant. For our purposes, the following portion of the Rule is relevant:

> 373.-(1) Security for costs may be ordered,
>
> . . .
>
> (f) where the action is brought by a nominal plaintiff;
>
> . . .
>
> (h) where an action is brought on behalf of a class and the plaintifff is not possessed of sufficient property to answer the costs of the action, and it appears that the plaintiff is put forward or instigated to sue by others . . . .

The purpose of this Rule is to ensure that a successful defendant will be indemnified, at least in part, where party and party costs are awarded. In light of our fundamental recommendation to institute a "no way" costs regime, the concept of security for costs has been rendered inapposite in class actions: under the proposed *Class Actions Act*, ordinarily there will be no award of party and party costs.[444]

In this regard, reference should be made to the approach taken to representative actions brought under section 97 of the *Business Corporations Act*.[445] Although the rule that costs usually follow the event applies to such

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[443] See *supra*, ch. 8, sec. 4(d), and Draft Bill, s. 12(1).

[444] It will be recalled that we have recommended two exceptions to the "no way" rule. First, at any stage of the proceedings, costs may be awarded in the event of vexatious, frivolous, or abusive conduct on the part of either of the parties. Secondly, on the hearing of a certification motion, the court will have a residual discretion to award costs where it would be unjust to deprive the successful party of costs: see *supra*, this ch., sec. 5(a).

[445] R.S.O. 1980, c. 54, s. 97(3). See, also, the proposed *Business Corporations Act, 1981*, Bill 6, 1981 (32d Leg., 1st Sess.), s. 248(3).

proceedings, the Act provides that an order for security for costs cannot be made against a shareholder plaintiff. Presumably, the policy underlying this restriction is an awareness that the practical effect of allowing security for costs could be to deter meritorious actions where the plaintiff possesses a modest personal stake in the suit. We believe that this policy is equally valid in class actions.

Finally, it should be emphasized that our views respecting the impropriety of security for costs are confined to those stages of a class action concerned with common, as opposed to, individual questions. Thus, our criticisms do not apply to the operation of this concept in individual proceedings, which are to be governed by the costs rules applicable in individual actions. In these proceedings, as we have explained earlier, a defendant could request an order for security for costs against an individual claimant.

Accordingly, we recommend that the proposed *Class Actions Act* should provide that, except in individual proceedings, security for costs shall not be required in an action commenced under the Act.[446]

b. Interlocutory Proceedings

The class action procedures drafted or influenced by Professor Williams have addressed the issue of the costs of an interlocutory motion. Under the proposed competition legislation, Bill C-42 and Bill C-13, the court was given a discretion to award costs as an exception to the general "no way" rule. In the Draft Bill for a Class Actions Act proposed by the Law Reform Committee of South Australia, the discretion to award costs to the defendant on an interlocutory application was narrowly circumscribed. Costs could be awarded only "where the application has been made necessary by some default or unreasonable act or omission on the part of the plaintiff".[447]

In our view, the application to interlocutory motions of a rule that costs follow the event would undermine a basic policy behind our costs proposals – to remove unreasonable costs burdens from the shoulders of the representative plaintiff. If such a rule were implemented, a defendant would be able to threaten the class plaintiff with a financial risk; the alternative would be to accede to the demands of the defendant in the motion, although it might prejudice the successful prosecution of the class action. Accordingly, we recommend that, as in motions in individual actions, the court should have a discretion to determine the costs of an interlocutory motion.[448] Consistent with an earlier recommendation, we further recommend that this discretion not extend to awarding costs against absent class members.[449]

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[446] See Draft Bill, s. 41(2).

[447] South Australia Draft Bill, *supra*, note 241, s. 11(2)(*c*).

[448] See Draft Bill, s. 41(1)(*c*).

[449] *Supra*, this ch., sec. 5(a).

c. Payment into Court and Offers to Settle

When we considered what costs rules should apply to individual proceedings, we observed that, as a result of our recommendation,[450] the rules governing payment into court and offers to settle, established by the Supreme Court Rules of Practice and by the *Provincial Court (Civil Division) Project Act*,[451] would apply. At that time, we did not address the question whether, and, if so, to what extent, these rules should apply to the claim of the entire class.[452] We now propose to consider this matter.

Rules 306 to 318*a* of the Rules of Practice establish a procedure by which a defendant may pay money into court in satisfaction of a cause of action or claim. For our purposes, the most important aspect of payment into court is the costs implications of a failure by the plaintiff to take the money offered. If a plaintiff does not accept the money, and fails to recover an amount at trial exceeding that which has been paid in by the defendant, he normally will be obliged to pay costs incurred after the date of payment.[453]

The Rules of Practice deal with offers to settle only in the context of proceedings brought under the *Family Law Reform Act*.[454] Unlike payment into court, the offer to settle procedure is available to both parties. Rule 775*i* provides that, if an offer to settle the action is not accepted, the court, when it later considers the question of costs, "may take into account the terms of the offer and the date on which the offer was served". Rule 49 of the proposed Williston Committee Rules,[455] by contrast, would establish a more detailed procedure governing offers to settle in all kinds of civil action. Moreover, it would provide that certain costs consequences follow if a party refuses an offer to settle and later fails to obtain a judgment more favourable than the terms of the offer.

Payment into court and offer to settle procedures are in furtherance of a general policy favouring the resolution of disputes without resort to the courts. Yet, while this is a salutary objective, we are of the view that the present payment into court rules and the offer to settle rule proposed by the Williston Committee should not apply without modification to actions brought under the proposed *Class Actions Act*.

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[450] See *supra*, this ch., sec. 5(c).

[451] R.S.O. 1980, c. 397.

[452] This issue has arisen in the United States under Fed. R. Civ. P. 23. In *Gay v. Waiters' & Dairy Lunchmen's Union, Local No. 30*, 86 F.R.D. 500 (N.D. Cal. 1980), the Court held that Fed. R. Civ. P. 68, which is identical in purpose to our payment into court rules did not apply to class actions.

[453] *Maines v. Acme Plumbing & Heating*, [1952] O.W.N. 91 (C.A.), at 93. Rule 48 of the Williston Committee Rules, *supra*, note 22, governs payment into court and codifies the common law rule respecting the costs consequences of a failure of the plaintiff to accept a payment.

[454] R.S.O. 1980, c. 152.

[455] *Supra*, note 22.

There are two reasons why these rules, which would impose costs penalties on parties who refuse to accept the amount paid, ought not to apply to class actions. First, in many cases, the extent of the potential liability for costs would involve a financial risk that a class representative could not afford to assume. For example, a defendant could pay an unreasonably low amount into court and the class representative simply could not afford to refuse it. In accepting a payment for this reason, the class plaintiff would not be guided by a concern to fulfil his duty of adequate representation to the class, but rather by an understandable fear of bearing an onerous costs penalty. Thus, a payment by the defendant would drive a wedge between the class plaintiff and absent class members.

The situation of a representative plaintiff in a class action is wholly distinguishable from that of a plaintiff in an individual action. In an individual action, because a plaintiff's claim almost invariably exceeds his potential liability for costs, the payment into court rules facilitate an acceptable level of settlement. In class actions, on the other hand, due to the ordinarily substantial discrepancy between the potential costs and the personal interest of the class representative, the result will almost invariably be settlement; relatively strong cases will likely be settled for significantly smaller amounts than may be obtained at trial.

The second reason why the present payment into court rules and proposed offer to settle rule are inappropriate in class actions is that they are mechanisms for the private termination of disputes. Yet, in chapter 20, we shall recommend that any settlement or discontinuance contemplated in a class action, whether before or after certification, should receive prior court approval.[456] Hence, under the proposed Ontario *Class Actions Act*, whether settlement will bind the class will depend upon the approval of the court, rather than on the consent of the active litigants alone. In our view, the incorporation of procedures for private settlement would conflict with a scheme requiring judicial approval as a prerequisite to the termination of class litigation.

Despite our dissatisfaction with the present payment into court rules and the proposed offer to settle rule in the context of class actions, we are concerned that, without such procedures and the application of appropriate costs sanctions, a fair settlement offer from one party could be unreasonably refused by the other. This danger would be particularly acute where the class representative and the class lawyer have concluded an agreement under which solicitor and client costs are to be paid only in the event of success; in such a case, the class plaintiff may be less inclined to accept either a reasonable offer to settle or a reasonable amount paid into court.

This concern is the crucial countervailing consideration that prevents us from simply recommending that the abovementioned rules should not apply under the proposed *Class Actions Act*. The public interest in consensual termination of disputes prior to trial must be balanced against the danger that the incorporation of otherwise salutary procedures may undermine the role of the representative plaintiff as guardian of the interests of class members.

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[456] See *infra*, ch. 20, sec. 5.

We believe that these interests will be reconciled effectively, and the integrity of the requirement for settlement approval preserved, if the following procedure is instituted instead of the present payment into court rules and the proposed offer to settle procedure of the Williston Committee. Either the defendant or the class representative should be entitled to make an offer to settle a class action by serving the offer on the opposite party, and then submitting it to the court. If the court determines that the terms of the offer are reasonable, and the offer is not accepted, the court should be empowered to award costs against the recalcitrant party if he achieves a less favourable result at trial.[457] This mechanism will prevent unreasonable conduct by either party. If the defendant makes an unreasonably low offer, the court will reject it. If the offer is fair from the perspective of the class, a representative plaintiff who unreasonably refuses to accept it will risk an award of costs against him.

Recommendations

The Commission makes the following recommendations:

1. Actions brought under the proposed *Class Actions Act* should not be governed by the costs rules that govern individual actions brought in the Supreme Court of Ontario and the county and district courts.

2. (1) Party and party costs should not be awarded to a party at the certification hearing or at the common questions stage of a class action, except

   (a) at the certification hearing, where it would be unjust to deprive the successful party of costs, or

   (b) in the event of vexatious, frivolous, or abusive conduct on the part of any party.

   (2) Where costs are awarded to a defendant at the certification hearing, the common questions stage of a class action, or on an interlocutory motion (see Recommendation 17), the representative plaintiff alone, and not absent class members, should be liable for the costs.

3. (1) In a successful class action,

   (a) the fees and disbursements payable by a representative plaintiff to a class lawyer should be deducted from the monetary relief to which the class is entitled; and

   (b) where a representative plaintiff has paid disbursements, he should be entitled to be reimbursed for them, and such disbursements should be deducted from the monetary relief to which the class is entitled.

   (2) The share of each class member should be reduced so that he will contribute an amount equal to the proportion that his share constitutes of the total recovery.

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[457] See Draft Bill, s. 48.

4. (1) Notwithstanding the *Solicitors Act* and *An Act respecting Champerty*, a representative plaintiff and a class lawyer should be entitled to enter into an agreement in writing that stipulates that the lawyer will be entitled to receive payment for fees and disbursements only in the event of success in the action.

   (2) For the purpose of Recommendation 4(1), success in the action should include a favourable judgment on the common questions or judicial approval of a settlement that benefits the class.

5. An agreement of the kind described in Recommendation 4 should neither stipulate the amount of the lawyer's payment in respect of fees and disbursements nor stipulate a method by which they are to be calculated, and any attempt to do so should be void.

6. Where an agreement of the kind described in Recommendation 4 has been made, and the class lawyer becomes entitled to receive payment for fees and disbursements, the judge who has given judgment on the common questions, or who has approved a settlement, should determine

   (a) the amount of the lawyer's fees and an additional amount, determined to be fair and reasonable compensation to the lawyer for assuming the risk of undertaking the action on the basis of payment only in the event of success, and

   (b) the amount of disbursements to which the lawyer is entitled, including interest thereon, calculated on the balance of the disbursements incurred, as totalled at the end of each six month period following the date of the agreement.

7. (1) Whether or not a representative plaintiff and a class lawyer have made an agreement of the kind described in Recommendation 4, the fees and disbursements payable to the class lawyer should be determined by a judge, and this task should not be delegated to a master.

   (2) The judge should determine fees and disbursements at the conclusion of the individual proceedings or at such time and upon such terms and conditions as is considered proper.

8. Where the common questions are decided in favour of the class, or if there is a settlement, and whether or not a representative plaintiff and a class lawyer have entered into an agreement that stipulates that the lawyer will be entitled to receive payment only in the event of success in the action, the fees and disbursements to which the lawyer is entitled should be deducted from the class recovery prior to the distribution of the shares to class members.

9. (1) Where, in individual proceedings, the defendant is ordered to pay monetary relief to class members, the amounts should be paid into court and should not be paid to the class members as they are determined.

   (2) The fees and disbursements payable to the class lawyer should be

deducted from the total of the individual recoveries, after which such recoveries should be distributed proportionally to class members.

10. In individual proceedings,

    (a) the costs provisions of the rules made under the *Provincial Court (Civil Division) Project Act* should apply to claims of $3,000 or less, and their applicability should not be restricted to class actions brought in The Municipality of Metropolitan Toronto; and

    (b) the costs provisions of the *Judicature Act* and the Supreme Court of Ontario Rules of Practice made thereunder should apply to claims of more than $3,000.

11. A representative plaintiff and a class lawyer should be entitled to agree that the lawyer will advance the initial costs of post-certification notice and post-judgment notice pursuant to an agreement that he will be reimbursed only in the event of success in the action.

12. The court should have a discretion to determine by whom the costs of general notice should be paid, as well as the power to apportion the costs between the parties.

13. The parties should be entitled to determine who should pay the costs of notice of settlement, subject to the overriding discretion of the court to order otherwise.

14. (1) The costs of distributing an aggregate award, including the cost of notice and payment of an appropriate fee to the person or persons administering the distribution, should be left to the discretion of the court.

    (2) Where the court orders these costs to be paid, they should be deducted from the aggregate award.

15. The court, in permitting intervention, should be empowered to set terms and conditions respecting costs.

16. Except in individual proceedings, security for costs should not be required in an action commenced under the proposed *Class Actions Act.*

17. The court should have a discretion to determine the costs of an interlocutory motion.

18. (1) Except in individual proceedings, the present payment into court rules of the Supreme Court of Ontario Rules of Practice and the offer to settle rule proposed by the Civil Procedure Revision Committee should not apply without modification to actions brought under the proposed *Class Actions Act.*

    (2) The offer to settle procedure applicable to actions brought under the proposed *Class Actions Act* should contain the following provisions:

(a) the representative plaintiff or the defendant may make an offer to settle the action by serving the offer on the other party, and then submitting it to the court;

(b) after service of the offer, the court should be empowered to determine whether the offer is reasonable; and

(c) if the court determines that the offer is reasonable, and it is refused by the party upon whom it has been served, the court should be empowered to order the recalcitrant party to pay costs if, after trial, a less favourable result is achieved.

CHAPTER 18

THE BINDING EFFECT OF A CLASS ACTION JUDGMENT

1. INTRODUCTION

In a class action, a representative plaintiff initiates and conducts litigation on behalf of absent class members who seldom participate in the preparation or presentation of the case. This representative quality of a class action raises fundamental policy issues. For example, should a member of the class, who is not a formal party to the action, be bound by a judgment that resolves an issue common to the class? Further, assuming that a final judgment in a class action should have some *res judicata* effect, should class members be precluded from claiming in subsequent individual litigation relief that might have been granted in the class action, but was not sought by the representative plaintiff? In addition, another related issue warrants discussion: whether a class member who has excluded himself from the class litigation can rely on a favourable class judgment in a subsequent individual suit against the same defendant.

In this chapter, we shall address these issues. We begin with a brief outline of the general doctrine of *res judicata.* Thereafter, we shall consider the doctrine in the context of class actions. Finally, we shall state our conclusions and recommendations.

2. THE DOCTRINE OF *RES JUDICATA*

In *Ord v. Ord*, Lush J., with whom Salter J. agreed, described the doctrine of *res judicata* as follows:[1]

> Now, there is no difficulty in seeing what, in its strict and proper sense, the plea of res judicata means. The words 'res judicata' explain themselves. If the res – the thing actually and directly in dispute – has been already adjudicated upon, of course by a competent Court, it cannot be litigated again.

Viewed in this way, the doctrine of *res judicata* precludes repeated litigation of the same issue. The other fundamental aspect of the doctrine is that only the parties to the litigation, and their privies,[2] and not third persons or

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[1] [1923] 2 K.B. 432, at 439, [1923] All E.R. 206. See, generally, Spencer Bower and Turner, *The Doctrine of Res Judicata* (2d ed., 1969), at 1.

[2] For a discussion of the meaning of the word "privies", see Sopinka and Lederman, *The Law of Evidence in Civil Cases* (1974), at 373-75.

strangers to the proceedings, will be bound by the judgment in the action.[3]

The doctrine of *res judicata* rests upon solid foundations.[4] It seems clear that it is in the interest of society that there be an end to litigation, and that no one should be twice harassed for the same cause.[5] The doctrine of *res judicata* serves to shield litigants from harassment and to protect a defendant against the danger of double recovery and the vexation and expense of repeated litigation. The doctrine also fosters an economic use of court time. Furthermore, it lends stability to judicial determinations by preventing inconsistent adjudications of identical claims or issues.

The doctrine of *res judicata* was originally known as estoppel by record or "estoppel by the written record of a court of record".[6] However, today it is more commonly referred to as estoppel by *res judicata*, or estoppel *per rem judicatam.* Subsumed under the general doctrine of *res judicata* are two principles. The broader principle of *res judicata* is derived from the maxim *nemo debet bis vexari pro una et eadem causa* and prevents a party from raising in subsequent litigation any fact in support of a claim or defence that could have been asserted in the prior proceeding but was not.[7] The narrower principle[8] is that any action or issue decided by a court of competent jurisdiction cannot be relitigated in a subsequent suit between the same parties or their privies.[9] This principle of *res judicata* consists of two distinct

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[3] *Gray v. Lewis* (1873), 8 Ch. App. 1035, 43 L.J. Ch. 281 (C.A.), and *R. v. Hutchings* (1881), 6 Q.B.D. 300, 44 L.T. 364 (C.A.).

[4] For a discussion of the policy issues underlying the doctrine of *res judicata*, see the following cases: *Angle v. M.N.R.*, [1975] 2 S.C.R. 248, (1974), 47 D.L.R. (3d) 544 (subsequent references are to [1975] 2 S.C.R.); *Fenerty v. City of Halifax* (1920), 50 D.L.R. 435, 53 N.S.R. 457 (S.C., T.D.); *Lockyer v. Ferryman* (1877), 2 A.C. 519 (H.L.); *New Brunswick R. Co. v. British and French Trust Corp. Ltd.*, [1939] A.C. 1 (H.L.); and *Carl-Zeiss-Stiftung v. Rayner and Keeler Ltd. (No. 2)*, [1967] 1 A.C. 853 (H.L.).

[5] These principles are sometimes expressed by the maxims *interest (or expedit) reipublicae ut sit finis litium*, and *nemo debet bis vexari pro una et eadem causa.* See, generally, Spencer Bower and Turner, *supra*, note 1, at 11.

[6] *Angle v. M.N.R., supra*, note 4, at 253, *per* Dickson J., with whom Martland and Judson JJ. concurred.

[7] *McIntosh v. Parent* (1924), 55 O.L.R. 552, [1924] 4 D.L.R. 420 (App. Div.) (subsequent references are to 55 O.L.R.); *Parna v. G. & S. Properties Ltd.*, [1973] 2 O.R. 765, 35 D.L.R. (3d) 231 (C.A.); *Gettle Bros. Construction Co. Ltd. v. Alwinsal Potash of Canada Ltd.* (1973), 34 D.L.R. (3d) 286 (Sask. C.A.); and *Ord v. Ord, supra*, note 1. And see *Town of Grandview v. Doering*, [1976] 2 S.C.R. 621, at 634, [1976] 1 W.W.R. 321, where the majority of the Court adopted the following passage from Vice-Chancellor Wigram's reasons for judgment in *Henderson v. Henderson* (1843), 3 Hare 100, at 115, 67 E.R. 313:

> 'The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.'

[8] See *Hall v. Hall and Hall's Feed & Grain Ltd.* (1958), 15 D.L.R. (2d) 638 (Alta. S.C., App. Div.), and *Ord v. Ord, supra*, note 1.

[9] See *McIntosh v. Parent, supra*, note 7, at 555.

aspects of estoppel, commonly referred to as "cause of action estoppel" and "issue estoppel",[10] each of which merits further comment.

(a) Cause of Action Estoppel

This type of *res judicata* dictates that parties or their privies[11] cannot assert or deny, as against their opponents in previous litigation, a cause of action that a court of competent jurisdiction made the subject of its judgment in the previous case.[12] Cause of action estoppel consists of two principles, "merger" and "bar": if the plaintiff was successful in the first suit, his cause of action is said to *merge* in the judgment and he is precluded from reasserting it; if he was unsuccessful in the prior action, his cause of action is said to be *barred* by the judgment in favour of the defendant.[13]

In the application of this type of estoppel, it is important for a plaintiff to determine the scope of his cause of action in order to avoid the consequences of what has become known as the "rule against splitting". This rule prohibits a litigant from bringing separate actions by splitting an underlying factual situation or cause of action that properly should have been the subject of only one lawsuit.

The issue whether personal injury and property damage arising out of the same negligent act of the defendant constitute one or two causes of action was raised specifically in *Cahoon v. Franks*[14] and *Cox v. Robert Simpson Co. Ltd.*[15] In *Cahoon v. Franks*, the plaintiff commenced an action for property damage to his automobile following a collision allegedly caused by the negligence of the defendant. After the expiry of the limitation period set out in section 131(1) of *The Vehicles and Highway Traffic Act*,[16] the plaintiff sought leave to

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[10] See *Angle v. M.N.R., supra*, note 4, and *Carl-Zeiss-Stiftung v. Rayner and Keeler Ltd. (No. 2), supra*, note 4. See, also, *Fidelitas Shipping Co. Ltd. v. V/O Exportchleb*, [1966] 1 Q.B. 630, at 640, [1965] 2 All E.R. 4 (C.A.), where Lord Denning M.R., with whom Danckwerts L.J. concurred, described the difference between these two aspects of *res judicata* as follows:

> The law, as I understand it, is this: if one party brings an action against another for a particular cause and judgment is given upon it, there is a strict rule of law that he cannot bring another action against the same party for the same cause. Transit in rem judicatam . . . . But within one cause of action, there may be several issues raised which are necessary for the determination of the whole case. The rule then is that, once an issue has been raised and distinctly determined between the parties, then, as a general rule, neither party can be allowed to fight that issue all over again.

[11] See *supra*, note 2.

[12] See *Hall v. Hall and Hall's Feed & Grain Ltd., supra*, note 8, and *Morgan Power Apparatus Ltd. v. Flanders Installations Ltd.* (1972), 27 D.L.R. (3d) 249 (B.C.C.A.).

[13] See *Fidelitas Shipping Co. Ltd. v. V/O Exportchleb, supra*, note 10. See, also, Watson and Williams, *Canadian Civil Procedure* (2d ed., 1977), at 5-21.

[14] [1967] S.C.R. 455, 63 D.L.R. (2d) 274 (subsequent references are to [1967] S.C.R.).

[15] (1973), 1 O.R. (2d) 333, 40 D.L.R. (3d) 213 (C.A.).

[16] R.S.A. 1955, c. 356.

amend his statement of claim to include a claim for personal injuries. The defendant argued that the plaintiff was attempting to add a new cause of action after the expiry of the limitation period. The Supreme Court of Canada, however, in affirming the decision of the Appellate Division of the Supreme Court of Alberta, permitted the plaintiff to amend his statement of claim on the ground that only one cause of action arose out of the single tortious act, notwithstanding that the plaintiff had suffered both damage to his property and injury to his person. In so holding, the Court ruled that *Brunsden v. Humphrey*,[17] a leading English decision, was no longer good law in Canada and ought not to be followed. Hall J., who delivered the judgment of the Supreme Court of Canada, cited with approval the following passage from the reasons for judgment of Porter J.A. in the Supreme Court of Alberta, Appellate Division:[18]

> '"The factual situation" which gave the plaintiff a cause of action was the negligence of the defendant which caused the plaintiff to suffer damage. This single cause of action cannot be split to be made the subject of several causes of action.'

Presumably, on this reasoning, should a plaintiff suffer different types of damage, he would not be able to institute a separate action in relation to each type of damage, but rather he would be required to seek complete recovery in one action.[19]

In *Cox v. Robert Simpson Co. Ltd.*,[20] the Ontario Court of Appeal relied upon the decision of the Supreme Court of Canada in *Cahoon v. Franks.* In

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[17] (1884), 14 Q.B.D. 141, [1881-85] All E.R. Rep. 357 (C.A.). In this case, it was held that a tort causing both property damage and personal injuries gave rise to two separate causes of action.

[18] *Supra*, note 14, at 459. This passage appears in *Franks v. Cahoon* (1966), 60 D.L.R. (2d) 237, at 240, 58 W.W.R. 513 (Alta. S.C., App. Div.). Smith C.J.A. and Cairns J.A. concurred with Porter J.A.

[19] See Williston and Rolls, *The Law of Civil Procedure* (1970), Vol. 1, at 398.

[20] *Supra*, note 15. And see *Vaughan v. Scott* (1979), 27 O.R. (2d) 560, 107 D.L.R. (3d) 153 (Co. Ct.), which distinguished *Cox v. Robert Simpson Co. Ltd.* The facts of the former case were as follows. The plaintiff was involved in a motor vehicle accident. The plaintiff's insurer recovered judgment in a subrogated action with respect to the property damage sustained. Subsequently, the plaintiff brought an action seeking damages for personal injury arising out of the accident. The defendants moved to dismiss the action as an abuse of process. It was held, however, that the defendant's application should be dismissed and the action permitted to proceed. The Court noted that, while the defendant's negligence had given rise to only one cause of action, there existed two potential plaintiffs – the plaintiff who had been injured and who sought compensation for personal injuries, and the statutory or contractual plaintiff who was entitled to proceed in the injured party's name. The Court stated, at 569, that this finding did not deviate from the decision in *Cahoon v. Franks* but merely affirmed its spirit:

> > At the case at bar the one cause of action has by statute been split between two potential plaintiffs and the single cause of action is not split to be made the subject-matter of several causes of action but instead the negligence of the defendant has in these circumstances given a right to the statutory or contractual plaintiff as well as the actual plaintiff to bring an action.
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> The Court further commented, at 569, that it would be against "the interests of justice to preclude the 'actual' plaintiff from pursuing his personal right to have a Court adjudicate on the relief he seeks in law".

this case, the plaintiff sued and conducted his own action in the division court for property damage to his automobile and thereafter commenced an action in the county court claiming damages for personal injuries arising out of the same accident. The defendant brought a successful motion before the county court claiming that, in accordance with section 83(2) of *The Division Courts Act*,[21] the plaintiff had accepted payment of the division court judgment as full satisfaction of his "claim" and, therefore, was barred from bringing a second action. The plaintiff appealed, contending that there existed a distinction between a "claim", within the meaning of the section, and a "cause of action", and submitted that, while his claim had been satisfied, the part of his cause of action with respect to his personal injury had not and still survived. This argument was not accepted by Arnup J.A. who, in delivering the judgment of the Court of Appeal, stated as follows:[22]

> We are unable to accept . . . [the plaintiff's] position and in particular by reason of the decision of the Supreme Court of Canada in *Cahoon v. Franks* . . . .
>
> If the plaintiff had a claim in the Division Court it was because his claim was founded on a cause of action. In our view, all of the damages arising from the negligence of the defendant had to be assessed in one action . . . .

Accordingly, the appeal was dismissed.

(b) Issue Estoppel

The determination in previous litigation of an issue that is essential and fundamental to a judgment precludes the parties and their privies from relitigating the same issue in a different cause of action. This aspect of *res judicata* is referred to as "collateral estoppel", "estoppel by judgment", or simply "issue estoppel". While the pleas of merger and bar are by their nature defendants' pleas, issue estoppel may be asserted by either party, depending upon in whose favour the issue was originally determined.

Traditionally the plea of issue estoppel has not been available in a subsequent suit involving a nonparty to the prior action. It has been held that a nonparty cannot be bound by, or take advantage of, the determination of issues in a previous case.[23] However, despite its long existence, this traditional view of the doctrine of issue estoppel has not gone unquestioned or uncriticized. In two decisions of the United States Supreme Court,[24] it has

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[21] R.S.O. 1960, c. 110, s. 83(2):

> 83.-(2) . . . the sum so paid shall be paid to the plaintiff, and he shall be deemed to have accepted it in full satisfaction of his claim, and all proceedings in the action shall be stayed . . . .

See now R.S.O. 1980, c. 476, s. 83(2).

[22] *Supra*, note 15, at 334.

[23] See *Alexander v. Herman* (1912), 30 O.W.N. 755 (H.C. Div.); *Foggo v. Foggo*, [1952] 2 D.L.R. 701 (B.C.C.A.); *Carl-Zeiss-Stiftung v. Rayner and Keeler Ltd. (No. 2), supra*, note 4; and *Gray v. Lewis, supra*, note 3.

[24] See, for example, *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322 (1979), and *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313 (1971). For an extensive list of cases in the United States that have rejected the traditional view of this *res judicata* doctrine, see Furman, "Offensive Assertion of

been expressly abandoned in favour of permitting the assertion of issue estoppel by nonparties,[25] a view that is also reflected in recent English decisions.[26]

In the United States, it would appear that issue estoppel in favour of nonparties may be asserted either defensively or offensively. A defensive assertion of issue estoppel usually involves a situation where there are two defendants potentially liable to one plaintiff and where the plaintiff, after unsuccessfully attempting to sue one defendant, seeks to litigate the same issue against the other defendant in a subsequent action. In this situation, the general trend, particularly in the United States federal courts, has been to permit the defendant in the subsequent action to estop the plaintiff from relitigating the issue, provided no unfairness will result.[27]

Offensive assertion of issue estoppel by a nonparty, on the other hand, involves a situation where there are two potential plaintiffs and one defendant. The following example illustrates its use. Assume there has been an accident involving two automobiles, and A, the driver of one vehicle, successfully sues and recovers damages against B, the driver of the other vehicle, who is held solely responsible for the accident. C, a passenger in A's car, then seeks to recover damages against B in a subsequent action. C, by offensively asserting the principle of issue estoppel, can effectively rely upon the prior court's finding of B's negligence and thereby prevent the defendant from relitigating this issue, provided B had been afforded a full and fair opportunity to defend in the first action.[28]

Cases in the United States involving an offensive assertion of issue estoppel are not as frequent as those involving a defensive assertion of the plea, and have been criticized more often.[29] It has been suggested that an

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Collateral Estoppel by Persons Opting Out of a Class Action" (1980), 31 Hastings L.J. 1189, at 1190, *n.* 5.

[25] In the United States, the assertion of issue estoppel by nonparties is referred to as "the doctrine of non-mutuality of estoppel" or "non-mutual collateral estoppel". This doctrine can be asserted only *by* a nonparty and not *against* a nonparty, except in rare circumstances, because otherwise the nonparty would be denied his day in court: see *supra*, ch. 3, sec. 1(a)(ii). See, also, Note, "Collateral Estoppel of Nonparties" (1974), 87 Harv. L. Rev. 1485, and Note, "The Impacts of Defensive and Offensive Assertion of Collateral Estoppel by a Nonparty" (1967), 35 Geo. Wash. L. Rev. 1010.

[26] See *Hunter v. Chief Constable of West Midlands*, [1981] 3 All E.R. 727 (H.L.), *sub nom. McIlkenny v. Chief Constable of the West Midlands*, [1980] Q.B. 283, [1980] 2 W.L.R. 689, [1980] 2 All E.R. 227 (C.A.), and *Tebbutt v. Haynes*, [1981] 2 All E.R. 238 (C.A.).

[27] See *Bernhard v. Bank of America Nat'l Trust & Savings Ass'n*, 19 Cal. 2d 807, 122 P.2d 892 (S.C. 1942), the first case to overrule expressly the traditional doctrine of estoppel and permit a defensive use of issue estoppel by a nonparty. And see *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, supra*, note 24; *Bruszewski v. United States*, 181 F.2d 419 (3d Cir. 1950), *cert.* denied 340 U.S. 865 (1950); and *Teitelbaum Furs, Inc. v. Dominion Ins. Co. Ltd.*, 58 Cal. 2d 601, 25 Cal. Rptr. 559 (S.C. 1962). See, also, Walpin, "Res Judicata and Collateral Estoppel", in Practising Law Institute, *Current Problems in Federal Civil Practice 1979* (1978), Vol. 1, at 339.

[28] See Watson and Williams, *supra*, note 13, at 5-22, where this example is given.

[29] See, for example, *Zdanok v. Glidden Co.*, 327 F.2d 944 (2d Cir. 1964), *cert.* denied 377 U.S. 934 (1964), and *Parklane Hosiery Co., Inc. v. Shore, supra*, note 24. And see Note, "The Impacts of Defensive and Offensive Assertion of Collateral Estoppel by a Nonparty", *supra*, note 25, at 1036-37.

offensive assertion of issue estoppel can result in unfairness to a defendant, particularly where the defendant has not vigorously defended the prior litigation – because, for example, it involved only a nominal sum – and then finds himself estopped from defending on the merits against a subsequent claimant suing for a much larger amount based on the same factual situation.[30] Furthermore, the use of this plea has been criticized for adversely affecting consolidation in the initial law suit by fostering a type of "wait-and-see" attitude in potential litigants, whereby they are encouraged to stay out of the initial litigation in order to await its outcome. If the results are favourable, a subsequent suit may be initiated with the plaintiff relying on the prior judgment; if they are not, then a second suit may still be launched and the issue of the defendant's liability relitigated because, as noted earlier, issue estoppel may not be asserted *against* a nonparty.[31]

In Ontario, the assertion of issue estoppel by nonparties has not been widely accepted and, it would appear, has been supported in only one decision. In *Nigro v. Agnew-Surpass Shoe Stores Ltd.*,[32] Weatherston J. permitted litigants to rely on determinations made in an earlier action to which they were neither parties nor privies. In the earlier case, proceedings were initiated by the owner of a shopping centre against a number of defendants as a result of a fire in the centre. One defendant, Agnew-Surpass Shoe Stores Ltd., was held liable in negligence, while the claims against the other defendants were dismissed.[33] A subsequent action was brought by a number of tenants of the shopping centre against all but one of the same defendants in the prior action, and third party proceedings were initiated against the owner of the shopping centre. Agnew-Surpass filed a statement of defence and the plaintiffs, who had not been parties to the prior proceedings, then brought a motion seeking to strike out those portions of the statement of defence that denied liability. The remaining defendants moved to strike out the statements of claim against them, and the owner of the shopping centre sought to have the third party proceedings against it dismissed. The applicants alleged that the issue as to liability was *res judicata.*

Weatherston J., in granting all the applications, stated as follows:[34]

> An estoppel, based on a prior judgment, is not limited to cases where there is an identity of the subject-matter of the litigation *and of the parties* . . . .
>
> Because this [the doctrine of estoppel *per rem judicatam*] is a rule of public

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[30] See *Berner v. British Commonwealth Pacific Airlines, Ltd.*, 346 F.2d 532 (2d Cir. 1965), *cert.* denied 382 U.S. 983 (1966). See, also, Note, "The Impacts of Defensive and Offensive Assertion of Collateral Estoppel by a Nonparty", *supra*, note 25, at 1036-37, and Furman, *supra*, note 24, at 1194.

[31] See *supra*, note 25, and *Reardon v. Allen*, 213 A.2d 26 (N.J. Supp. Ct. 1965). See, also, Note, "The Impacts of Defensive and Offensive Assertion of Collateral Estoppel by a Nonparty", *supra*, note 25, and Furman, *supra*, note 24.

[32] (1977), 18 O.R. (2d) 215, 82 D.L.R. (3d) 302 (H.C.J.), appeal dismissed (1977), 18 O.R. (2d) 714, 84 D.L.R. (3d) 256 (C.A.).

[33] See *Agnew-Surpass Shoe Stores Limited v. Cummer-Yonge Investments Ltd.*, [1976] 2 S.C.R. 221, (1975), 55 D.L.R. (3d) 676.

[34] *Supra*, note 32, at 217-18 (emphasis added).

policy, in which the Court exercises its inherent jurisdiction to prevent an abuse of its process, I think I am entitled to take a rather broader view of the matter than by simply applying the doctrine of *res judicata* in its narrow sense.

The several defendants and the third party have had their day in Court, and as among themselves the issue as to liability for the fire has been determined. It ought not to be open to any of them to have that same issue retried in actions by plaintiffs who suffered damages in the same fire. The plaintiffs, by bringing this motion, have identified themselves with the plaintiff in the first action, and it is not open to them now to blame any of the defendants other than Agnew-Surpass.[35]

The approach of this case does not appear to have been discussed in subsequent Canadian decisions.

3. THE DOCTRINE OF *RES JUDICATA* AND CLASS ACTIONS

(a) The Present Law in Ontario

The principles of *res judicata* that we have discussed apply, in general, to class actions initiated in this Province. However, the rule that a person cannot be bound by a judicial decision *in personam* unless he was a party or privy to the action has been modified in its application to class actions. Although Rule 75 of the Supreme Court of Ontario Rules of Practice[36] does not expressly address this issue, it seems accepted law that members of a class are bound by a judgment on the common questions, whether or not it is favourable,[37] provided that it was not obtained by fraud or collusion and that the court was not falsely led to believe that the class suit was justly fought or impartially represented when it was not.[38]

While it has been held that the general doctrine of *res judicata* is applicable to class actions, Ontario case law addressing specific aspects of the doctrine seems to be lacking. Accordingly, it is important to deal with the question whether, if a representative plaintiff successfully sued and obtained judgment for property damage, class members who had also incurred personal injuries as a result of the defendant's negligence could be prevented from seeking such relief in subsequent individual actions. Similarly, in light of the fact that the court, under our recommendations, would have a discretion

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[35] In reaching this conclusion, Weatherston J. relied on the English case of *Thoday v. Thoday*, [1964] P. 181, [1964] 1 All E.R. 341 (C.A.). For a critical comment on the case of *Nigro v. Agnew-Surpass Shoe Stores Ltd.*, see Annotation (1977), 3 C.P.C. 195.

[36] Supreme Court of Ontario Rules of Practice, R.R.O. 1980, Reg. 540.

[37] See *May v. Wheaton* (1917), 41 O.L.R. 369 (H.C. Div.). And see *Commissioners of Sewers of the City of London v. Gellatly* (1876), 3 Ch. D. 610, at 615-16, 45 L.J. Ch. 788 (C.A.); *In re Calgary and Medicine Hat Land Co., Ltd.*, [1908] 2 Ch. 652, at 659, 78 L.J. Ch. 97 (C.A.); *Markt & Co., Ltd. v. Knight Steamship Co., Ltd.*, [1910] 2 K.B. 1021, (C.A.) at 1039; *Moon v. Atherton*, [1972] 2 Q.B. 435 (C.A.), at 441; and *Bamber v. Bank of Nova Scotia*, [1943] 4 D.L.R. 526, at 532, [1943] 2 W.W.R. 529 (Alta. S.C., App. Div.).

[38] *Commissioners of Sewers of the City of London v. Gellatly, supra*, note 37, at 616. See, also, *Brenner v. Title Guarantee & Trust Co.*, 11 N.E.2d 890 (N.Y.C.A. 1937), at 893. And see Spencer Bower and Turner, *supra*, note 1, at 202.

to permit class members to exclude themselves from a class action, it is important to deal with the impact of the doctrine of issue estoppel upon a class member who has excluded himself from the class suit.[39] Should such a class member institute a subsequent individual action, could he rely upon a favourable judgment obtained in the class proceedings?

(b) Other Class Action Statutes and Proposals

Unlike Rule 75 of the Supreme Court of Ontario Rules of Practice, most recent class action statutes and proposals appear to address, in some manner, the *res judicata* effect of a final judgment. In this section, we shall make brief reference to the approach taken in other jurisdictions to this matter. First, reference will be made to jurisdictions outside Ontario that do not deal expressly with the *res judicata* effect of a class action judgment. Secondly, we shall canvass those class action statutes and proposals that do address this issue and that appear to have adopted the traditional principles of *res judicata*. Thereafter, we shall consider the provisions that seem to deal with such issues as the rule against splitting and the assertion of issue estoppel by a nonparty.

(i) No Express Reference to *Res Judicata*

Rule 23 of the United States Federal Rules of Civil Procedure does not address expressly the issue of the *res judicata* effect of a final judgment on the common questions.[40] Rule 23(c)(3) provides only that, in class actions brought under Rule 23(b)(1) and (2), the judgment, "whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class".[41] Where the class action has been brought under Rule 23(b)(3), the judgment "whether or not favorable to the class, shall include and specify or describe those to whom the [post-certification] notice . . . was

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[39] But see *In re TransOcean Tender Offer Securities Litigation*, 455 F. Supp. 999 (N.D. Ill. 1978), where this issue was addressed. For the Commission's recommendations concerning the circumstances in which a class member may exclude himself from a class action, see *supra*, ch. 12, sec. 3(b).

[40] Fed. R. Civ. P. 23, promulgated at 383 U.S. 1029 (1966). See, also, *An Act to Amend the Combines Investigation Act*, Bill C-42, 1977 (30th Parl. 2d Sess.), and *An Act to Amend the Combines Investigation Act*, Bill C-13, 1977 (30th Parl. 3d Sess.), which do not appear to address expressly the issue of the *res judicata* effect of a judgment on the common questions.

[41] Fed. R. Civ. P. 23(c)(3) provides as follows:

> 23(c)(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

See, also, N.Y. Civ. Prac. Law §905 (McKinney), which is similar to Rule 23(c)(3). For a list of those states that have adopted Rule 23 without modification, see *supra*, ch. 2, sec. 2 (e)(ii)d.

directed, and who have not requested exclusion, and whom the court finds to be members of the class".

It can be argued that this provision does not necessarily mean that a judgment on the common questions in every case will be binding on all class members who have not excluded themselves.[42] Indeed, it seems clear that the *res judicata* effect of a judgment in a class action brought under Rule 23 can be determined only in a subsequent action, where the court will consider whether an absent class member was afforded due process of law. If it is determined that he was not afforded due process, because of inadequate representation or inadequate notice, the absent class member will not be bound by the class action judgment.[43] Furthermore, it has been suggested that if Rule 23 prescribed the *res judicata* effect of a class action judgment, such a provision might constitute a violation of the Rules Enabling Act,[44] which provides that the federal rules of court procedure "shall not abridge, enlarge or modify any substantive right". The *res judicata* effect of a judgment generally is considered to be substantive, rather than procedural, in nature.[45]

(ii) Adoption of Traditional Principles of *Res Judicata*

Certain class action provisions deal expressly with the binding effect of a class action judgment. Section 57.6 of the Illinois Civil Practice Act[46] provides as follows:

> 57.6 Any judgment entered in a class action brought under Section 57.2 shall be binding on all class members, as the class is defined by the court, except those who have been properly excluded from the class under paragraph (b) of Section 57.5.

It will be noted that this section expressly provides that a class action judgment shall be binding on all class members, "as the class is defined by the court", with the exception of "those who have been properly excluded from the class". It would appear that this class action statute has adopted, without modification, the traditional view of the doctrine of *res judicata.*

Article 1027 of the Quebec *Code of Civil Procedure*[47] is structured in a manner similar to section 57.6 of the Illinois Civil Practice Act. Rule 42(c)(3)

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[42] See Wright and Miller, *Federal Practice and Procedure* (1972), Vol. 7A, §1789, at 176.

[43] *Hansberry v. Lee*, 311 U.S. 32 (1940); *Battles v. Braniff Airways, Inc.*, 146 F.2d 336 (5th Cir. 1944), *cert.* denied 325 U.S. 871 (1945); *Gonzales v. Cassidy*, 474 F.2d 67 (5th Cir. 1973); *Schrader v. Selective Service System Local Board No. 76 of Wisconsin*, 329 F. Supp. 966 (W.D. Wis. 1971); and *Pasquier v. Tarr*, 318 F. Supp. 1350 (E.D. La. 1970).

[44] 28 U.S.C. §2072.

[45] See Wright and Miller, *supra*, note 42, §1789, at 177.

[46] Illinois Civil Practice Act, Ill. Ann. Stat. ch. 110 (Smith-Hurd 1981 Supp.).

[47] *Code of Civil Procedure*, R.S.Q. 1977, c. C-25, art. 1027, as enacted by S.Q. 1978, c. 8, s. 3.

of the Texas Rules of Civil Procedure,[48] although different in form, appears similar in effect to these provisions.

(iii) Modification of Traditional Principles of *Res Judicata*

Several class action statutes and proposals have amended the law of *res judicata* as it applies to class actions.

Section 7 of the Draft Bill for a Class Actions Act proposed by the Law Reform Committee of South Australia[49] provides as follows:

> 7. Judgment in a class action shall not affect –
>
> (1) a member of the class on whose behalf the action is brought who has excluded himself from the class;
>
> (2) a member of the class who has not so excluded himself except to the extent that the judgment determines the claim described and the relief specified in the order that the action is to be maintained as a class action.

This section, while generally adopting the doctrine of *res judicata*, is designed to restrict the binding effect of a class action judgment. By section 7(1), a member of the class who has excluded himself from the class is not affected by the judgment in a class action. Section 7(2) provides that a member of the class who has not so excluded himself is likewise not affected by the judgment except to the extent that the judgment determines "the claim described and the relief specified in the order that the action is to be maintained as a class action".[50] This provision would clearly seem to be directed at avoiding the "rule against splitting".

The provisions of the South Australia Draft Bill referred to above appear to be modelled upon the provisions proposed by Professor Williams in his consumer class action mechanism.[51] Section 7 of his Model Consumer Class Actions Act provides as follows:[52]

> 7. Judgment in a class action shall not affect:–
>
> (1) a member of the class on whose behalf the action is brought who has excluded himself from the class;

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[48] Tex. R. Civ. P. 42(c)(3). See, also, Tex. R. Civ. P. 42(c)(2).

[49] Law Reform Committee of South Australia, "Draft Bill for a Class Actions Act", in *Thirty-sixth Report Relating to Class Actions* (1977), at 12, s. 7 (hereinafter referred to as "South Australia Draft Bill").

[50] See, also, s. 3(7) of the South Australia Draft Bill, *ibid.*, which prescribes the contents of a certification order, and in this way completes the scheme of *res judicata* established by s. 7.

[51] Williams, "Model Consumer Class Actions Act", in "Consumer Class Actions in Canada – Some Proposals for Reform" (1975), 13 Osgoode Hall L.J. 1, at 65 (hereinafter referred to as "Williams' Model Act").

[52] See, also, Williams' Model Act, *ibid.*, s. 3(6), which prescribes the contents of an order that an action be maintained as a class action.

(2) a member of the class who has not so excluded himself except to the extent that the judgment determines the questions common to the class which are defined in the order that the action is to be maintained as a class action and which relate to the claim described and the relief specified in the order.

Unlike the South Australia Draft Bill, section 7 restricts the binding effect of a judgment in a class action to the "questions common to the class which are defined in the order that the action is to be maintained as a class action". However, it would seem that both proposals have the effect of precluding the application of the rule against splitting by restricting the binding effect of the class action judgment to only what was actually sought and determined in the class action. Therefore, if a representative plaintiff restricts the class claim to monetary relief for property damage, a class member would appear to be bound only by the judgment rendered in that regard and to remain free to initiate a separate action seeking monetary relief for personal injuries.[53]

Also of interest in this context is section 13 of the American Uniform Class Actions Act,[54] which provides as follows:[55]

13. In a class action certified under Section 2 . . . a judgment as to the claim or particular claim or issue certified is binding, according to its terms, on any member of the class who has not filed an election of exclusion . . . . The judgment shall name or describe the members of the class who are bound by its terms.

As will be noted, the section provides that "a judgment as to the claim or particular claim or issue certified is binding". While it is not stated explicitly in the brief annotations to the Uniform Class Actions Act, it could be argued that, as with the proposals considered above, this wording has the consequence of limiting the binding effect of a class action judgment to only that relief actually sought in the action.

One other class action proposal warrants consideration. Bill H.R. 5103, proposed by the Office for Improvements in the Administration of Justice of the United States Department of Justice, also expressly addressed the issue of the *res judicata* effect of a class action judgment. Section 3024 of this Bill provided as follows:[56]

3024(a) When in accordance with the principles of equity, a judgment on the merits in a public action, unless otherwise limited by its terms, shall be conclusive

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[53] See Williams' Model Act, *ibid.*, s. 7.

[54] National Conference of Commissioners on Uniform State Laws, Uniform Class Actions Act, Uniform Laws Ann. (1975), Vol. 12 (Cum. Supp. 1981), at 20 (hereinafter referred to as "U.C.A.A.").

[55] See, also, U.C.A.A., *ibid.*, §4(a), which prescribes the contents of the certification order, and §5(a), which deals with amendment of the certification order.

[56] Small Business Judicial Access Act of 1979, United States Department of Justice, Office for Improvements in the Administration of Justice, Bill H.R. 5103, 96th Cong., 1st Sess. §3024 (1979) (hereinafter referred to as "O.I.A.J. Bill H.R. 5103"). See, also, A Bill To provide for the reform of class action litigation procedures, United States Department of Justice, Office for Improvements in the Administration of Justice, Bill S. 3475, 95th Cong., 2d Sess. §3023 (1978), which is similar to O.I.A.J. Bill H.R. 5103, §3024.

in any other action for damages arising out of the same transaction or occurrence, or series of transactions or occurrences, against –

(1) a person for or against whom the public action judgment was entered as a defendant;

(2) a person injured in an amount not exceeding $300 represented in the action, and the United States, or any State, suing on his behalf. In an action not filed or assumed by the United States, the judgment shall be conclusive against the United States in any other action only to the extent that the United States sues on behalf of such person.

(b) When in accordance with the principles of equity, a judgment on the merits in a class compensatory action, unless otherwise limited by its terms, shall be conclusive in any other civil action for damages arising out of the same transaction or occurrence, or series of transactions or occurrences, against –

(1) a person for or against whom the class compensatory action judgment was entered as a defendant; and

(2) an injured person who remained in or entered the action pursuant to section 3022(e), and any State suing on his behalf.

While the majority of the class action provisions that we have canvassed provide that class members who have excluded themselves will either not be included in the class action judgment[57] or bound by the class action judgment,[58] they do not deal with the issue whether an excluded class member who institutes a subsequent individual action can invoke, in that action, a favourable class judgment. While section 3024 of O.I.A.J. Bill H.R. 5103 does not seem to modify the traditional doctrine of *res judicata* in any other way, it does provide expressly that a class action judgment "shall be conclusive in any other [civil] action for damages arising out of the same transaction or occurrence, or series of transactions or occurrences, against [*inter alia*] . . . a person for or against whom the [class action] judgment was entered as a defendant". In this way, therefore, the section deals with the impact of the assertion of issue estoppel by a nonparty.[59]

4. CONCLUSIONS

In light of the problems that we have canvassed in this chapter, the Commission has concluded that the proposed *Class Actions Act* would be

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[57] See, for example, Fed. R. Civ. P. 23(c)(2)(B).

[58] Tex. R. Civ. P. 42; Illinois Civil Practice Act, *supra*, note 46, §57.6; South Australia Draft Bill, *supra*, note 49, s. 7; Williams' Model Act, *supra*, note 51, s. 7; and U.C.A.A., *supra*, note 54, §13.

[59] See United States Department of Justice, Office for Improvements in the Administration of Justice, *H.R. 5103 – Bill Commentary: The Case for Comprehensive Revision of Federal Class Damage Procedure* (1979), at 65-66, where it is stated as follows (footnotes omitted):

> Section 3024 clearly delineates the estoppel effects of the public and class compensatory actions. Generally, the nonmutuality of estoppel rule articulated in *Blonder-Tongue Labs, Inc. v. University of Illinois Foundation* is followed. 'When in accordance with the principles of equity' the defendant is estopped from relitigating in another civil damage action any issue decided for or against him in either a public or compensatory action.

incomplete were it not to include provisions dealing with the *res judicata* effect of a class action judgment. We have considered three aspects of the *res judicata* effect of a class action judgment. First, we have examined whether an absent class member should be bound by a judgment that resolves an issue common to the class. Secondly, we have considered the application of the rule against splitting in the context of a class action. Finally, we have canvassed the issue whether a class member who has excluded himself from the class should be permitted to rely upon a favourable class judgment in subsequent individual proceedings.

We are aware of the assertion that a broad application of the present law of *res judicata* to class action judgments may place a class member in a position of disadvantage. One potential danger is that an unsuccessful class suit will prejudice absent class members who might have sued successfully on their own. Although this constitutes a legitimate concern, it is one that has been addressed specifically by the Commission in the design of the proposed Ontario class action procedure. In order to protect the interests of absent class members, a number of safeguards have been incorporated into the proposed class action statute, including the following: an adequacy of representation test that must be met at certification;[60] a right to apply to intervene in the class suit;[61] a discretion in the court to permit class members to exclude themselves from a class action;[62] a general notice provision;[63] and rights of appeal.[64]

In the view of the Commission, the arguments in favour of applying the general doctrine of *res judicata* to class action judgments are persuasive. A class action procedure is designed to achieve judicial economy by diminishing the total amount of litigation – and therefore the total expenditure of time and costs – required to resolve disputes arising from mass wrongs, and by minimizing the possibility of inconsistent adjudications involving common questions and related events. It is evident that, if a class action judgment were not to bind class members, benefits such as these could not be achieved. In fact, it is axiomatic that the very merit or utility of a class action lies in the *res judicata* effect of its judgment on the common questions. We have no hesitation in agreeing with the comment of the Law Reform Committee of South Australia that the "central feature of a class action is that the judgment enures for the benefit of the members of the class and binds them".[65] Accordingly, we recommend that, subject to one qualification dealt with below, a judgment on the questions common to the class should bind every member of the class who has not excluded himself from the class action.[66]

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[60] See *supra*, ch. 8, sec. 4(c).

[61] See *supra*, ch. 8, sec. 4(d).

[62] See *supra*, ch. 12, sec. 3(b).

[63] See *supra*, ch. 13, sec. 4(c).

[64] See *infra*, ch. 21.

[65] Law Reform Committee of South Australia, *Thirty-sixth Report Relating to Class Actions* (1977), at 7.

[66] See Draft Bill, s. 34(2).

Conversely, members of the class who have excluded themselves from a class action should not be bound by the class action judgment.[67]

As we have indicated, our recommendation concerning the binding effect of a judgment on the questions common to the class is subject to a qualification. We are concerned with the effect that the "rule against splitting" could have in the class action context. For example, at present, if a representative plaintiff successfully sued and recovered damages for injury to property, it is likely that those class members who have also incurred personal injuries as a result of the defendant's negligence would be prevented from seeking such relief in subsequent individual actions. We do not consider this result satisfactory. In our view, the binding effect of the judgment on the common questions should be restricted to the relief that was actually sought and determined in the action. Shortly stated, we are of the opinion that, in a class action context, the substantive law of *res judicata* should be amended to preclude the application of the rule against splitting. Accordingly, the Commission recommends that a judgment on the questions common to the class should be binding to the extent only that the judgment determines the questions common to the class that are defined in the order certifying the action as a class action and that relate to the claim described and the relief specified in the order.[68]

It will be noted that our recommendation forges a link between the certification order and the *res judicata* effect of a judgment on the common questions. It was in part for this reason that, in an earlier chapter, we recommended that a certification order should contain, *inter alia*, a description of the class on whose behalf the action is brought, a brief description of the nature of the claim made on behalf of the members of the class, including the relief claimed, and a definition of the questions of law or fact common to the class.[69] We are also of the view that the proposed *Class Actions Act* should prescribe the contents of a judgment on the common questions in the same way that it prescribes the contents of a certification order. Accordingly, we recommend that the Act should provide that a judgment on the questions common to the class shall name or describe the members of the class who are bound by the judgment, describe the nature of the claim made on behalf of the members of the class and specify the relief awarded, and define the questions of fact or law common to the class.[70]

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[67] *Ibid.*, s. 34(1). See, also, s. 20(5) of the Draft Bill, which provides that those who have excluded themselves from a class action should no longer be members of the class for any purpose, and should not be entitled to any relief awarded in the class action.

[68] *Ibid.*, s. 34(2).

[69] See *supra*, ch. 10, sec. 4(c)(i), and Draft Bill, s. 9(1). In addition, we recommended that the proposed *Class Actions Act* should contain a provision expressly authorizing the court to amend a certification order at any stage of a class action, as well as a provision specifying that an order certifying an action as a class action includes an order amending such an order: see Draft Bill, s. 9(2) and (3). We recommended that these two provisions should be included because of the possibility that certain aspects of a class action could be modified, thereby necessitating an amendment to the contents of the original certification order which, in turn, would affect the *res judicata* effect of the final judgment. For example, the court could decide to modify its definition of the common questions to be dealt with in the action, thereby altering the issues that the class members would be prevented from relitigating.

[70] See Draft Bill, s. 34(3).

It is our intention to restrict the *res judicata* effect of a judgment on the common questions: the judgment should determine those issues, and only those issues, that have been raised specifically by the representative plaintiff. It is the opinion of the Commission that the inclusion of a description of the issues that may not be relitigated by a class member who has not excluded himself from the class, as well as a description of the individuals who will be bound by the court's determination, in both the certification order and the final judgment, will not only alleviate the potential problem created by the rule against splitting but, in addition, will assist a subsequent court with *res judicata* determinations.

To complete our discussion of the issues that arise in the context of the binding effect of a class action judgment, one further matter requires comment. While it seems generally accepted that a class member who has excluded himself from the class action should not be bound by a judgment on the questions common to the class, there is a lack of consensus as to whether such a person should be permitted to rely upon a judgment in favour of the class in a subsequent individual action against the class defendant. It will be recalled that, in Ontario, the assertion of issue estoppel by nonparties in a nonclass action context has not been widely accepted and, it would appear, has been supported in only one decision.[71]

Although there is no Canadian authority that deals with the assertion of issue estoppel by nonparties in the context of a class action, this matter was considered in the American case, *In re TransOcean Tender Offer Securities Litigation.*[72] The plaintiffs in this case had previously opted out of a state class action in which the defendants had been held liable for breach of a fiduciary duty.[73] Subsequently, the plaintiffs, in asserting a claim under the federal securities legislation, sought to estop the defendants from relitigating this issue. In discussing this tactic, the Court stated as follows:[74]

> It could be argued that permitting opt out plaintiffs to assert collateral estoppel offensively might encourage plaintiffs in future class actions to exclude themselves from the class. Such an argument, however, has several shortcomings. As a practical matter, an extremely small percentage of persons seek exclusion from a class and to be represented by their own counsel. Moreover, few people can afford to bear the cost and burden of opting out and filing their own lawsuits. This is especially so where the individual claims are small . . . . Even if plaintiffs decide to opt out, file suit, and subsequently attempt to assert a successful class action judgment offensively, the requirement that 'the party against whom an estoppel is asserted had a full and fair opportunity to litigate is a most significant safeguard' for defendants . . . . Finally, there are many possible reasons – apart from 'waiting on the sidelines' to see what happens in a class action – why class members might elect to exclude themselves. To not apply collateral estoppel because the opt out plaintiffs might be 'waiting on the sidelines' would

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[71] *Nigro v. Agnew-Surpass Shoe Stores Ltd., supra*, note 32. See *supra*, this ch., sec. 2(b).

[72] *Supra*, note 39. It may be noted that Fed. R. Civ. P. 23 does not specifically address the issue whether a class member who has opted out of a class action may rely on a favourable class judgment in a subsequent individual action.

[73] *Lynch v. Vickers Energy Corp.*, 383 A.2d 278 (Del. S.C. 1977).

[74] *Supra*, note 39, at 1008.

> undermine the important policy reasons for applying collateral estoppel . . . . The overriding considerations are whether the defendants had a full and fair opportunity to litigate in the Delaware proceedings and whether judicial economy would be served by an application of collateral estoppel.

In the result, the plaintiffs' assertion was accepted by the Court and the defendant was held estopped.

While we recognize the force of the reasoning of the Court in the *TransOcean* case, we are of the opinion that there are powerful arguments that lead to a contrary conclusion. To assert that an extremely small percentage of persons seek exclusion from a class, and that few people can afford the cost and burden of opting out and filing their own law suits, does not assist in determining what the result should be where a class member has successfully sought exclusion from the class and has instituted his own individual suit against the class defendant. In the *TransOcean* case, the Court stated that there were many reasons why class members might elect to exclude themselves from the class, apart from "waiting on the sidelines" to see what happens in a class action. Even accepting that such reasons may exist, what if they are absent in any particular case? What if a class member excludes himself from the class for no reason other than to await, with impunity, the determination of a final judgment on the common questions?[75]

The considerations regarded by the Court in the *TransOcean* case as overriding were whether the defendants had had a full and fair opportunity to litigate in the class proceedings and whether judicial economy would be served by an application of issue estoppel. As noted earlier, under our proposed *Class Actions Act*, one key provision is that of adequacy of representation, the purpose of which is to ensure that the issues common to the class are fully and fairly presented to the court. Further, should any class member consider the representation to be inadequate, our proposal confers

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[75] It has been argued by certain commentators in the United States that, notwithstanding a general acceptance of the assertion of issue estoppel by nonparties, this practice should not be permitted in a class action context: see, for example, Kaplan, "Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)" (1967), 81 Harv. L. Rev. 356, at 391, *n.* 136; Note, "Class Action Judgments and Mutuality of Estoppel" (1975), 43 Geo. Wash. L. Rev. 814, at 830; Note, "Proposed Rule 23: Class Actions Reclassified" (1965), 51 Va. L. Rev. 629, at 652-54. But see Homburger, "State Class Actions and the Federal Rule" (1971), 71 Colum. L. Rev. 609, at 647, where the author supports permitting opting-out class members to assert issue estoppel in a subsequent action. See, also, Furman, *supra*, note 24, at 1191, where the author is of the view that the courts should allow offensive assertion of issue estoppel in one exceptional situation: "when the person opting out holds such a strong individual interest in controlling his or her litigation that he or she would opt out irrespective of any collateral estoppel rights". It has also been suggested that, if the practice of permitting an opting-out class member to rely upon a favourable class judgment in a subsequent individual action were allowed, a form of "one-way intervention" would be reintroduced into the class action mechanism: see Wright and Miller, *supra*, note 42, §1789, at 171. It will be recalled that "one-way intervention" arose under pre-1966 "spurious" class suits in the United States, whereby class members who wished to take advantage of a favourable class judgment were required to intervene formally or "opt in", and if they failed to do so the judgment would not be binding on them: see *supra*, ch. 2, sec. 1(b), and Moore, *Federal Practice and Procedure* (1980), Vol. 3B, ¶23.11[3], at 23-2851 - 23-2857. This practice received considerable criticism and, in 1966, Federal Rule 23 was amended to preclude it.

upon him a right to apply to intervene in the class proceedings. In light of these safeguards, it may be contended that the considerations referred to in the *TransOcean* case, certainly that of judicial economy, would serve equally to render a class action judgment binding against a class member who has opted out, a result that, as we have previously noted, has generally been rejected.

We acknowledge the difficulty of this issue. However, we are not persuaded by the reasoning that would render a judgment on the common questions binding upon a class defendant, but not binding upon a member of the class who has excluded himself from the class proceedings. In our view, the same principle should apply to each party and, in the context of our proposed *Class Actions Act*, we consider it appropriate that, rather than bind both parties, a class action judgment should bind neither the class defendant nor those who have excluded themselves from the class action. Accordingly, we recommend that a judgment on the questions common to the class should not be binding upon persons who have excluded themselves from the class action or upon the defendant in any subsequent proceeding brought by a person who has excluded himself.[76]

We wish to emphasize that our discussion relates only to proceedings brought under the proposed *Class Actions Act*. We express no opinion as to the position where issue estoppel is asserted by a nonparty in a nonclass action context.

Recommendations

The Commission makes the following recommendations:

1. A judgment on the questions common to the class should bind every member of the class who has not excluded himself from the class action to the extent only that the judgment determines the questions common to the class that are defined in the order certifying the action as a class action and that relate to the claim described and the relief specified in the order.

2. A judgment on the questions common to the class should (a) name or describe the members of the class who are bound by the judgment; (b) describe the nature of the claim made on behalf of the members of the class and specify the relief awarded; and (c) define the questions of fact or law common to the class.

3. A judgment on the questions common to the class should not be binding upon persons who have excluded themselves from the class action or upon the defendant in any subsequent proceeding brought by a person who has excluded himself.

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[76] See Draft Bill, s. 34(1).

CHAPTER 19

STATUTORY LIMITATION PERIODS AND CLASS ACTIONS

1. INTRODUCTION

A statute of limitations operates to prevent a party from commencing proceedings after the passage of a specific period of time, generally measured from the accrual of the cause of action. As a general rule, time ceases to run upon the commencement of an action within that specified period of time. It is clear that, when a representative plaintiff commences a class action, this result will follow insofar as the individual cause of action of the class representative is concerned.[1] However, what of the causes of action of the absent class members? Does time likewise cease to run? If so, when does this occur: upon the commencement of the class action; upon the granting of certification; or, for example, upon the filing of a motion to intervene? Without statutory guidance, no certain answer is possible. Equally uncertain is the time when the limitation period, if suspended, will resume running against the absent class members. In the opinion of the Commission, these matters are important and should be dealt with in the proposed *Class Actions Act.*

Although the Draft Bill for a Class Actions Act proposed by the Law Reform Committee of South Australia[2] contains no provision dealing with limitation periods, the Committee was aware of the problems posed by limitation periods in the class action context. In its report on class actions, it stated as follows:[3]

> Class actions require some modification of the rules regarding limitation of actions. The ordinary limitation provisions must be made subject to the right of individual members of a class to establish their claims after the common questions have been determined, notwithstanding that the time for instituting proceedings has expired. Some provision must also be made for members of the

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[1] Holland, "Under the Portcullis and Inside the Golden Castle: *American Pipe & Construction Co. v. Utah*" (1974), 12 San Diego L. Rev. 169.

[2] Law Reform Committee of South Australia, "Draft Bill for a Class Actions Act", in *Thirty-sixth Report Relating to Class Actions* (1977), at 12 (hereinafter referred to as "South Australia Draft Bill").

[3] Law Reform Committee of South Australia, *Thirty-sixth Report Relating to Class Actions* (1977), at 10.

class who may have delayed their remedy as the result of the class action but who are disappointed in that expectation, as where an order to proceed as a class action is refused or having been granted is subsequently rescinded. We have not included these provisions in our draft bill as the parliamentary counsel will doubtless wish to advise the government as to whether such provisions should be included in the Class Actions Bill or in the statutes relating to limitation of actions.

In attempting to resolve these issues, it is helpful to consider the ways in which they have been dealt with in other jurisdictions. We commence our discussion with a summary of the experience that has been acquired by the United States federal courts in administering class actions instituted under Rule 23 of the United States Federal Rules of Civil Procedure.

2. STATUTORY LIMITATION PERIODS AND FEDERAL RULE 23

Rule 23 contains no provisions dealing with the impact of statutes of limitations in the class action context. However, following the adoption of revised Rule 23,[4] a number of cases considered the issue whether the

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[4] Fed. R. Civ. P. 23, promulgated at 383 U.S. 1029 (1966). Prior to the 1966 amendment of Fed. R. Civ. P. 23, there existed three types of class action – true, hybrid, and spurious: see *supra*, ch. 2, sec. 1(b). Under the original r. 23, it was clear that, with respect to "true" and "hybrid" class actions, the commencement of a suit suspended the running of the statute of limitations against all purported class members: see *Richmond v. Irons*, 121 U.S. 27 (1887), and *Pennsylvania Co. for Ins. on Lives & Granting Annuities v. Deckert*, 123 F.2d 979 (3d Cir. 1941). See, also, Moore, *Federal Practice* (2d ed., 1980), Vol. 3B, ¶23.90[3], at 23-551, and Wright and Miller, *Federal Practice and Procedure* (1972), Vol. 7A, §1800, at 258-59.

The issue whether the statute of limitations was suspended upon the commencement of a spurious class suit, however, never was addressed by the United States Supreme Court. The primary issue was whether absent class members could intervene after liability had been adjudicated for the purpose of sharing in a favourable judgment, when the running of the limitation period would normally have extinguished their claims. It will be recalled that this type of intervention, which was referred to as "one-way intervention", was treated as permissive, rather than as of right, because the judgment in a spurious class action was not binding on absent class members: see *supra*, ch. 2, sec. 1(b), and see Wright and Miller, *ibid.*, §1800, at 259-60.

It was decided by the majority of courts that such intervention was proper: see, in particular, *York v. Guaranty Trust Co. of New York*, 143 F.2d 503 (2d Cir. 1944), rev'd on other grounds 326 U.S. 99 (1945). See, also, *Escott v. Barchris Construction Corp.*, 340 F.2d 731 (2d Cir. 1965), *cert.* denied 382 U.S. 816 (1966); *DePinto v. Provident Security Life Ins. Co.*, 323 F.2d 826 (9th Cir. 1963), *cert.* denied 376 U.S. 950 (1964); *Union Carbide and Carbon Corp. v. Nisley*, 300 F.2d 561 (10th Cir. 1961), *cert.* denied 371 U.S. 801 (1962); and *Mutation Mink Breeders Ass'n v. Lou Nierenberg Corp.*, 23 F.R.D. 155 (S.D.N.Y. 1959).

However, certain courts were critical of this approach: see, for example, *Slack v. Stiner*, 358 F.2d 65 (5th Cir. 1966); *Pennsylvania Co. for Ins. on Lives & Granting Annuities v. Deckert, ibid.*; *P.W. Husserl, Inc. v. Newman*, 25 F.R.D. 264 (S.D.N.Y. 1960); and *Athas v. Day*, 161 F. Supp. 916 (D. Colo. 1958). These courts were of the opinion that such intervention, by encouraging absent class members to stand on the sidelines until the trial was completed and then either to intervene in the action, if it was successful, or to initiate individual actions, if it was not, operated to the extreme prejudice of the defendant: see Wright and Miller, *ibid.*, §1800, at 260. Perceiving a spurious suit as essentially a joinder device, these courts concluded that each member who moved to intervene should be required to satisfy the prerequisite of timeliness: see, for example, *Athas v. Day, ibid.*, at 919.

commencement of a class suit suspended the running of the applicable statute of limitations against all potential class members. The first two cases, *State of Minnesota v. United States Steel Corp.*[5] and *Esplin v. Hirschi*[6] settled the question only partially, holding that the statute of limitations would be halted by the filing of a class suit if the action was eventually certified. The effect of a denial of certification was not addressed.

The latter issue was first considered in *Philadelphia Electric Co. v. Anaconda American Brass Co.*[7] As in the case of the two prior decisions, the Court in *Philadelphia Electric* had no difficulty in asserting that, where a class action is certified, the limitation period should be deemed to have been suspended upon the filing of the class suit. However, the Court was of the opinion that, where certification is denied, only in certain circumstances should this result follow.[8] Fullam J. expressed the view that, where a class action is denied certification because of a failure to satisfy the "fundamental requirements" of a class action, as set out in Rule 23(a) and in the requirement that common questions predominate contained in Rule 23(b)(3), the statute of limitations is not suspended by the commencement of the suit.[9] On the other hand, he was of the opinion that if class status is refused for reasons of "judicial housekeeping" – for example, where there is a failure to satisfy the superiority requirement of Rule 23(b)(3)[10] – class members should receive the benefit of the suspension of the limitation period or, at the very least, should be entitled to this benefit upon proof of reliance.[11]

The suggestion of the Court in *Philadelphia Electric* that, in certain circumstances, reliance upon the initiation of a class action should operate to suspend the limitation period, should certification be denied, was carried forward in subsequent district court decisions.[12] These decisions were premised on the rationale that individuals who, in good faith, place their confidence in the initiation of a class suit, and who, therefore, do not bring their own timely suits, should not be penalized.

In 1974, the issue whether reliance should be a necessary precondition to the suspension of the limitation period was resolved by the United States Supreme Court in the significant decision of *American Pipe and Construction Co. v. Utah.*[13] This case was one of first impression for the Supreme Court.

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[5] 44 F.R.D. 559 (D. Minn. 1968).

[6] 402 F.2d 94 (10th Cir. 1968), *cert.* denied 394 U.S. 928 (1969).

[7] 43 F.R.D. 452 (E.D. Pa. 1968).

[8] See *ibid.*, at 461.

[9] *Ibid.*

[10] For a discussion of the superiority prerequisite, see *supra*, ch. 9, sec. 2.

[11] *Supra*, note 7, at 461. See, also, Holland, *supra*, note 1, at 182-83, where it is suggested that a test similar to that expounded by Fullam J. in *Philadelphia Electric* should be adopted.

[12] See, for example, *Abercrombie v. Lum's Inc.*, 345 F. Supp. 387 (S.D. Fla. 1972); *Rogers v. Coburn Finance Corp.*, 54 F.R.D. 417 (N.D. Ga. 1972); and *Buford v. American Finance Co.*, 333 F. Supp. 1243 (N.D. Ga. 1971).

[13] 414 U.S. 538 (1974).

Prior to *American Pipe*, the Court had never addressed the issue whether a statutory limitation period should be suspended upon the filing of a class suit that is eventually certified, much less the consequences of a suit that is denied class action status after the limitation period has expired. A brief statement of the facts of the case follows.

On May 13, 1969, eleven days prior to the expiry of the relevant statute of limitations,[14] the State of Utah instituted a civil antitrust action for treble damages against the American Pipe and Construction Company in the United States District Court for the District of Utah. Utah brought the action on its own behalf and as representative of a class of approximately 800 members, consisting of public bodies and agencies within the State of Utah and other western states that had not filed similar actions. The case was transferred to the United States District Court for the Central District of California for assignment to Judge Martin Pence, who had dealt with all the previous litigation within the Ninth Circuit arising from the pipe companies' alleged conspiracy.[15] On December 4, 1969, Judge Pence entered an order, pursuant to Rule 23(c)(1), denying class action status for failure to satisfy the numerosity prerequisite.

Eight days later, on December 12, 1969, more than sixty of the public entities in the purported class filed motions to intervene as plaintiffs in Utah's action. On March 20, 1970, Judge Pence denied the motions, concluding that the limitation periods had expired against the petitioners, thereby barring intervention. The Court specifically rejected the argument that the original filing of the class suit had operated to suspend the running of the limitation period until certification had been denied, leaving the purported class members with eleven days in which to intervene.[16] The United States Court of Appeals for the Ninth Circuit, however, reversed this decision, holding that, "as to members of the class Utah purported to represent, and whose claims it tendered to the court, suit was actually commenced by Utah's filing".[17]

The Supreme Court granted *certiorari*[18] to consider the important issue of the proper interaction between Rule 23 class actions and federal statutes of limitation, and unanimously affirmed the judgment of the Court of Appeals. The Supreme Court held that the timely commencement of a purported class

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[14] See the Clayton Act, 15 U.S.C. §15(b). However, the running of the limitation period had been suspended for several years by pending government criminal and civil actions: see the Clayton Act, 15 U.S.C. §16(b).

[15] In 1964, this Court had found American Pipe and Construction Co. and five other steel and concrete pipe companies guilty of violating §1 of the Sherman Act, 15 U.S.C. §1, and in 1968 it entered a negotiated "final judgment" against the companies in resolution of civil complaints that had been filed seeking to recover damages and to restrain further violations of the Sherman Act, Clayton Act, and False Claims Act: see Prince, "Antitrust Law – Class Actions – Tolling of Federal Statutes of Limitations – *American Pipe & Construction Co. v. Utah*" (1974), 15 B.C. Ind. & Com. L. Rev. 1010.

[16] *Utah v. American Pipe and Construction Co.*, 50 F.R.D. 99 (C.D. Cal. 1970), at 102-08.

[17] *Utah v. American Pipe and Construction Co.*, 473 F.2d 580 (9th Cir. 1973), at 584.

[18] *American Pipe and Construction Co. v. Utah*, 411 U.S. 963 (1973).

action suspends the applicable federal statute of limitations for all absent members of the class, regardless of whether the suit is denied certification after the statutory limitation period would have elapsed.[19] The Court specified, however, that the applicable limitation period would be suspended only until class action status was denied. Accordingly, since, at the time Utah initiated its action, eleven days of the limitation period remained unexpired, and since the motions to intervene were filed by the putative class members eight days after the District Court's denial of certification, the Supreme Court held the motions to be timely by three days.[20]

In arriving at this decision, the Supreme Court examined the policy considerations behind the formulation of both Rule 23 and statutory limitation periods. Stewart J., who delivered the opinion of the Court, commented that amended Rule 23 was a true representative procedure and was designed to remove the necessity for every class member to file papers with the court in order to ensure participation in the judgment.[21] He noted that the policies of "efficiency and economy of litigation"[22] underlying class actions would be frustrated if a general suspension of the limitation period upon the filing of a class suit were not approved.[23]

The Court further stated that the absent class members, whether or not they had relied upon the commencement of the class suit or were even aware of the proceedings, stood as "parties" to the purported class suit until such time as they received notice of the action and chose not to remain as class members. Stewart J. commented as follows:[24]

> Rule 23 is not designed to afford class action representation only to those who are active participants in or even aware of the proceedings in the suit prior to the order that the suit shall or shall not proceed as a class action . . . . [P]otential class members are mere passive beneficiaries of the action brought in their behalf. Not until the existence and limits of the class have been established and notice of membership has been sent does a class member have any duty to take note of the suit or to exercise any responsibility with respect to it in order to profit from the eventual outcome of the case. It follows that even as to asserted class members

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[19] *Supra*, note 13, at 552-53.

[20] *Ibid.*, at 560-61.

[21] *Ibid.*, at 550.

[22] *Ibid.*, at 553.

[23] *Ibid.*, at 551, where Stewart J. commented as follows:

> Thus, the commencement of the action satisfied the purpose of the limitation provision as to all those who might subsequently participate in the suit as well as for the named plaintiffs. To hold to the contrary would frustrate the principal function of a class suit, because then the sole means by which members of the class could assure their participation in the judgment if notice of the class suit did not reach them until after the running of the limitation period would be to file earlier individual motions to join or intervene as parties – precisely the multiplicity of activity which Rule 23 was designed to avoid in those cases where a class action is found 'superior to other available methods for the fair and efficient adjudication of the controversy.'

[24] *Ibid.*, at 551-52.

> who were unaware of the proceedings brought in their interest or who demonstrably did not rely on the institution of those proceedings, the later running of the applicable statute of limitations does not bar participation in the class action and in its ultimate judgment.

The Court then considered whether a general suspension of the limitation period upon the filing of a class suit would be inconsistent with the functional operation of a statute of limitations. It concluded that notification to the defendant of the putative class suit within the relevant limitation period was sufficient to satisfy the basic policies underlying such legislation. The Court noted that, in this case, the initiation of Utah's suit had provided notice to the defendants of "not only . . . the substantive claims being brought against them, but also of the number and generic identities of the potential plaintiffs who may participate in the judgment".[25] The Court reasoned, therefore, that the defendant would not be prejudiced because, "[w]ithin the period set by the statute of limitations, the defendants [would] have the essential information necessary to determine both the subject matter and size of the prospective litigation, whether the actual trial . . . [was] conducted in the form of a class action, as a joint suit, or as a principal suit with additional intervenors".[26] The Supreme Court concluded that its finding on the limitations issue was consistent with both Rule 23 and with the proper function of federal statutes of limitations.[27]

While the Supreme Court engaged in a broad policy analysis in its reasons for decision, technically its actual finding was quite narrow: "We hold that . . . at least where class action status has been denied solely because of failure to demonstrate that 'the class is so numerous that joinder of all members is impracticable,' the commencement of the original class suit tolls[28] the running of the statute for all purported members of the class who make timely motions to intervene after the court has found the suit inappropriate for class action status".[29] It might have been possible, therefore, to contend that the decision applied only where class action status had been denied for failure to meet the numerosity requirement. However, subsequent cases have rejected such a narrow interpretation.

Haas v. Pittsburgh National Bank[30] provided the first judicial analysis of the *American Pipe* decision. In this case, class status was denied because of inadequate representation. Nevertheless, the Court held that the filing of the class action had suspended the operation of the statutory limitation period for the benefit of all purported class members. The Court expressed the

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[25] *Ibid.*, at 555.

[26] *Ibid.*

[27] *Ibid.*

[28] The term "toll" is defined by *Black's Law Dictionary* (5th ed., 1979), at 1334 as follows:

> To bar, defeat, or take away; . . . .
>
> To suspend or stop temporarily as the statute of limitations is tolled during the defendant's absence from the jurisdiction and during the plaintiff's minority.

[29] *Supra*, note 13, at 552-53.

[30] 526 F.2d 1083 (3d Cir. 1975).

opinion that, although the *American Pipe* decision dealt only with the situation where certification had been denied for failure to meet the numerosity requirement of Rule 23, the broad principles it enunciated were equally applicable to the facts in issue.[31]

The *American Pipe* decision has continued to receive a liberal interpretation. At the federal district court level, limitation periods have been held suspended where class action status has been denied because common questions did not predominate.[32] The Supreme Court of the United States in *Eisen v. Carlisle & Jacquelin* commented that, upon the filing of a class suit, the statute of limitations was suspended for those class members who later chose to opt out.[33] And, in *United Airlines, Inc. v. McDonald*,[34] that Court held that, where certification is denied, and the denial of certification is appealed, the statute of limitations does not resume running until after the appeal has been heard.

3. STATUTORY LIMITATION PERIODS AND OTHER CLASS ACTION PROVISIONS

As in the case of the Draft Bill for a Class Actions Act proposed by the Law Reform Committee of South Australia[35] and Rule 23 of the United States Federal Rules of Civil Procedure, most class action legislation and proposals do not contain provisions that deal expressly with limitation periods. However, provisions of this nature are included in the Uniform Class Actions Act[36] and in the class action legislation recently enacted in Quebec.[37] We turn now to consider these provisions.

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[31] *Ibid.*, at 1097.

[32] See, for example, *Miller v. Central Chinchilla Group, Inc.*, 66 F.R.D. 411 (S.D. Iowa 1975), and *Goldstein v. Regal Crest, Inc.*, 62 F.R.D. 571 (E.D. Pa. 1974).

[33] 417 U.S. 156 (1974), at 176, *n.* 13. For a discussion of this case, see *supra*, ch. 13, sec. 2(a)(i).

[34] 432 U.S. 385 (1977), at 392-95. The decision of the United States Supreme Court in the *McDonald* case was applied subsequently in *Satterwhite v. City of Greenville*, 578 F.2d 987 (5th Cir. 1978). In addition, the Court of Appeals in *Satterwhite* further clarified the *American Pipe* decision. It held that the benefits of a suspended limitation period were not confined to those "members of the class who make timely motions to intervene after the court has found the suit inappropriate for class action status" (*American Pipe and Construction Co. v. Utah, supra*, note 13, at 552-53), as a narrow construction of the *American Pipe* decision would suggest, but included as well putative class members who wished to pursue their own suits.

And see *Jimenez v. Weinberger*, 523 F.2d 689 (7th Cir. 1975), *cert.* denied 427 U.S. 912 (1976), which held that if the representative plaintiff should appeal the denial of certification and lose, the statute of limitations would not resume running until the determination of the appeal proceedings.

[35] South Australia Draft Bill, *supra*, note 2.

[36] National Conference of Commissioners on Uniform State Laws, Uniform Class Actions Act, Uniform Laws Ann. (1975), Vol. 12 (Cum. Supp. 1981), at 20 (hereinafter referred to as "U.C.A.A.").

[37] *An Act Respecting the Class Action*, S.Q. 1978, c. 8.

(a) Uniform Class Actions Act

Provisions dealing with statutes of limitations are contained in section 18 of the Uniform Class Actions Act.[38] This section provides as follows:[39]

> 18. The statute of limitations is tolled for all class members upon the commencement of an action asserting a class action. The statute of limitations resumes running against a member of a class:
>
> (1) upon his filing an election of exclusion;
>
> (2) upon entry of an order of certification, or of an amendment thereof, eliminating him from the class;
>
> (3) except as to representative parties, upon entry of an order under Section 2 refusing to certify the action as a class action; and
>
> (4) upon dismissal of the action without an adjudication on the merits.

It is clear that the general rule in *American Pipe* has been adopted by this section. However, section 18 is silent as to the position where certification is denied and the denial of certification is appealed, an issue that, in the context of Rule 23, was resolved by the Supreme Court of the United States in *United Airlines, Inc. v. McDonald.*[40] The silence of section 18 on this point would seem to be attributable to the fact that the Uniform Class Actions Act was ratified by the National Conference of Commissioners on Uniform State Laws in 1976,[41] two years prior to the decision in the *McDonald* case, rather than to a conscious decision by the Commissioners to abstain from dealing with the issue.

(b) Quebec

Quebec is another jurisdiction that deals specifically with statutory limitation periods in its class action legislation. Article 2233*a* of the Quebec *Code of Civil Procedure*[42] provides as follows:

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[38] As noted earlier, the Uniform Class Actions Act has been adopted without modification by the states of North Dakota and Iowa: see N.D. Cent. Code R. Civ. P. 23 (1977) and Iowa R. Civ. P. 42.1-.20 (1980). See, also, Alpert, "The Uniform Class Actions Act: Some Promise and Some Problems" (1979), 16 Harv. J. Legis. 583, at 589, *nn.* 40 and 41. Section 18 of the Uniform Class Actions Act appears in the North Dakota statute as r. 23(r), which has been said to codify the *American Pipe* case: see Newberg, *Newberg on Class Actions* (1977), Vol. 1 (Cum. Supp. 1980), §1220b, at 227.

[39] See, also, legislation under consideration by a committee of the American Bar Association, Section of Litigation, *Proposed Class Action Legislation* (tentative draft, May 1980), §3002(d), which provides as follows:

> 3002(d) Any statute of limitation applicable to a cause of action pleaded in the class action shall be tolled from the date the action was filed with the court until the date the action is dismissed or until the date the action is determined not to be a class action, whichever occurs earlier.

[40] *Supra*, note 34. In this case, it will be recalled, the Court held that the statute of limitations does not resume running until after the hearing of the appeal.

[41] See *supra*, note 36, at 20.

[42] *Code of Civil Procedure*, R.S.Q. 1977, c. C-25, art. 2233*a*, as enacted by S.Q. 1978, c. 8, s. 51.

2233*a*. Prescription does not run against the member of the group on the account of which a motion for leave to bring a class action provided for by Book Nine of the Code of Civil Procedure is presented or, as the case may be, of the group described in the judgment granting the motion until

the motion is dismissed;

the member is excluded from the action by the description of the group made by the judgment on the motion, an interlocutory judgment or the final judgment of the court;

the motion is declared perempted;

the member requests his exclusion from the action;

the judgment granting the motion is annulled.

Prescription runs again, after a judgment, only when the judgment is no longer susceptible of appeal.

Viewed against the preceding discussion, it is apparent that this section represents, in general, a codification of the American experience under Rule 23.

4. POLICY ANALYSIS AND CONCLUSIONS

So far in this chapter we have considered the judicial response to the problem of statutory limitation periods and class actions in the administration of Rule 23 of the United States Federal Rules of Civil Procedure, and the solutions to this problem that have been proposed or enacted in other jurisdictions. At this stage, we wish to state our views on the impact of statutes of limitations upon class actions. In our opinion, a fair resolution of this issue requires a general consideration of the policies underlying both the class action procedure and statutory limitation periods.

As previously mentioned, the Commission sees the main policy objectives of class actions to be judicial economy and increased access to the courts. A general rule that the commencement of a class action suspends the running of limitation periods against absent class members, whether certification is granted or denied, would serve to promote the most efficient use of judicial resources. If the commencement of a class action did not have this effect, absent class members, where a class suit is filed shortly prior to the expiration of the statutory limitation period, would be forced to institute precautionary individual actions or to file formal motions to intervene as parties in order to preserve their legal rights. Moreover, even where, at the filing of a class action, the running of the limitation period had only commenced, protective measures would still be encouraged. Absent class members would be unsure whether certification would be granted and, in addition, they would be unable to ascertain with certainty the time that would elapse between the filing of the suit and the final resolution of the certification motion, particularly bearing in mind the possibility of appeal proceedings. In our view, such a result would be in direct contradiction to the class action goals of efficiency and economy of litigation.

It is also apparent that this approach would militate against the policy of increased access to the courts and the vindication of small claims. It would be

uneconomical for absent class members with individually nonrecoverable claims to incur the expense of filing precautionary motions to intervene. Furthermore, requiring absent class members so to act would frustrate one of our fundamental recommendations. In chapter 12,[43] we recommended that class members should not be required to opt in to a class suit prior to a determination of the common questions in order to protect their right to participate in a favourable judgment. For the reasons advanced in support of that recommendation, we are of the opinion that a class member should not be required to indicate formally his participation in a putative class action in order to avoid the adverse effects of the running of a statute of limitations.

It seems clear to the Commission that the approach that would most clearly further the policies underlying class actions would be one that called for a general suspension of the limitation period upon the commencement of an action in class form. However, the issue that remains contentious is whether such an approach would operate to the detriment of the policy behind the formulation of limitation periods.

In a previous Report, the Commission summarized the policies underlying the formulation of limitation periods as follows:[44]

> Lawsuits should be brought within a reasonable time. This is the policy behind limitation statutes. These laws are designed to prevent persons from beginning actions once that reasonable time has passed. Underlying the policy is a recognition that it is not fair that an individual should be subject indefinitely to the threat of being sued over a particular matter. Nor is it in the interests of the community that disputes should be capable of dragging on interminably. Furthermore, evidentiary problems are likely to arise as time passes. Witnesses become forgetful or die: documents may be lost or destroyed. Certainly, it is desirable that, at some point, there should be an end to the possibility of litigation in any dispute. A statute of limitation is sometimes referred to as an 'Act of peace'.
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> . . . .
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> Apart from the protection they give to potential defendants, limitation statutes enable the courts to function more effectively by ensuring that litigation is not started so long after the event that there are likely to be evidential difficulties. In addition, the commercial world is able to carry on more smoothly. The limitation statutes encourage early settlements so that the disrupting effect of unsettled claims on commercial intercourse is minimized.

It is apparent from the preceding discussion that the policies underlying class actions and statutory limitation periods, in effect, serve different masters. A class action procedure is predominantly a plaintiff's vehicle for redress, while a statutory limitation period is a defendant's shield. Nonetheless, we believe that these opposing policies can be reconciled. It is our view that a provision suspending the applicable limitation period at the commencement of a putative class action can exist harmoniously alongside the policies underlying both class actions and limitation periods.

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[43] See *supra*, ch. 12, sec. 4.

[44] Ontario Law Reform Commission, *Report on Limitation of Actions* (1969), at 9 and 10.

Fundamental to our view is the fact that, as stated by the Supreme Court of the United States in the *American Pipe* decision, the commencement of a class action will apprise the defendant of the potential claims against him. In the event that certification is denied and absent class members proceed to initiate separate actions against the defendant – actions which, without the proposed suspension provision, would be out of time – the defendant would not be prejudiced. Having been notified by the commencement of the class suit of the substantive claims asserted against him and the general number and identity of the potential claimants, the defendant cannot claim that the absent class members' individual suits were unforeseen.[45] Furthermore, because such suits would concern the same evidence, memories, and witnesses as would the subject matter of the class action, it is unlikely that the delay in the initiation of the individual suits will occasion evidentiary problems. Moreover, because of the representative character of a class suit, the judgment in which is binding on the entire class membership,[46] absent class members should not be considered as having slept on their rights if they await a denial of certification before initiating individual suits.

As we have indicated, the view that we have advanced is representative of the present state of the law under Rule 23 and is the position that has been adopted expressly both in the Uniform Class Actions Act[47] and in the provisions of the Quebec *Code of Civil Procedure*[48] that deal with class actions. However, this approach has been criticized by certain commentators in the United States.

Although these commentators favour a broad suspension of the limitation period upon the filing of a class suit that is eventually certified,[49] it has been argued that in no circumstances should the limitation period be deemed to have been suspended upon the filing of a class suit where certification is

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[45] See *Order of Railroad Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342 (1944), at 348-49, where the Court stated as follows (emphasis added):

> Statutes of limitation, like the equitable doctrine of laches, in their conclusive effects are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim *it is unjust not to put the adversary on notice to defend within the period of limitation* and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.

[46] See *supra*, ch. 18, sec. 4.

[47] U.C.A.A., *supra*, note 36, §18.

[48] *Code of Civil Procedure*, R.S.Q. 1977, c. C-25, art. 2233*a*, as enacted by S.Q. 1978, c. 8, s. 51.

[49] See, for example, Wheeler, "Predismissal Notice and Statutes of Limitations in Federal Class Actions After *American Pipe and Construction Co. v. Utah*" (1975), 48 So. Calif. L. Rev. 771; Sawyer, "Class Actions and Statutes of Limitations" (1980), 48 U. Chi. L. Rev. 106; Note, "Developments in the Law – Class Actions" (1976), 89 Harv. L. Rev. 1318 (hereinafter referred to as "Harvard Developments"); Kavanaugh, "Class Actions - Tolling of Statutes of Limitations - Adequate Representation - *Haas v. Pittsburgh National Bank*" (1976), 17 B.C. Ind. & Com. L. Rev. 915; Holland, *supra*, note 1; Prince, *supra*, note 15; and Welsh, "Class Actions Under New Rule 23 and Federal Statutes of Limitation: A Study of Conflicting Rationale" (1968), 13 Vill. L. Rev. 370.

refused.[50] It has been suggested that, in the latter situation, there is in effect no class action[51] and, accordingly, the policies underlying a class action procedure – for example, economy and efficiency of litigation[52] – and the representative nature of the suit should not be considered. Furthermore, it has been maintained that a more liberal provision would result in a windfall to absent class members at the expense of the defendant.[53]

As indicated, we are not of this view. In our opinion, such an approach is Draconian and, where certification is refused, could have the effect of turning a class action procedure into a trap for the unwary. This would certainly be the case where a class member has relied upon the initiation of the class suit and has refrained from commencing his own action. Prior to the *American Pipe* decision, it had been judicially suggested that, should a class action be denied certification, class members who *bona fide* have relied upon the class action should be afforded the benefit of a suspended limitation period.[54] However, we are not persuaded that, where certification is refused, the suspension of a limitation period should depend upon a showing of reliance. Proof of reliance itself could well result in a multiplicity of proceedings. Furthermore, class members with individually nonrecoverable claims would be unable to show reliance and, consequently, would be precluded from participating subsequently in a properly constituted class action.[55]

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[50] See Wheeler, *supra*, note 49.

[51] *Ibid.*, at 812.

[52] It may be contended that, if the limitation period were not suspended, economy and efficiency of litigation would not be served, as absent class members would be required to intervene to protect their individual claims. However, see Wheeler, *supra*, note 49, at 779, where it is suggested that few absent class members would have knowledge of the suit and fewer still would possess individually recoverable claims making it economically feasible for them to intervene. But see Harvard Developments, *supra*, note 49, at 1450.

[53] Wheeler, *supra*, note 49, at 782. And see Sawyer, *supra*, note 49, at 124, where the author states that the "simple suspension of the statute of limitations during the pendency of the class suit is unfair to both plaintiffs and defendants" and that "class members wishing to claim *American Pipe* tolling benefits should be required to intervene, rather than be allowed to file separate suits".

[54] See, for example, *Abercrombie v. Lum's Inc.*, *supra*, note 12; *Rogers v. Coburn Finance Corp.*, *supra*, note 12; and *Buford v. American Finance Co.*, *supra*, note 12. See, also, Prince, *supra*, note 15, and Holland, *supra*, note 1. It has been suggested, for example, that, after a negative class determination, a notice certifying the individual's knowledge of the suit could be filed with the court: see Prince, *supra*, note 15, at 1028-29.

[55] See Harvard Developments, *supra*, note 49, at 1448-54, where this shortcoming was considered. It was noted that, if reliance had to be proved by absent class members in order to receive the benefits of a suspended limitation period, those claimants with individually nonrecoverable claims would not be protected. For example, in the situation where, after an improper suit has been denied certification, a properly constituted one is initiated, absent class members with individually nonrecoverable claims might not be able to participate in the new suit because, unable to prove reliance, their claims could have become time-barred: *ibid.*, at 1450, *n.* 291. The authors of the article were supportive of the *American Pipe* decision and noted the possibility that, if the rule this decision espoused was not adopted, "the filing of a class complaint shortly before the running of the statute of limitations would make any class determination practically impossible": *ibid.*, at 1448, *n.* 280. Further, it is asserted in the Harvard Developments article that whether class members in fact had relied on the filing of the class complaint was irrelevant; rather, the important issue was whether the defendant had received adequate notice by the filing of the class complaint of the potential claims pending against him: *ibid.*, at 1450-51.

It is clear from the foregoing analysis that there are a number of ways in which the issue of the suspension of statutory limitation periods in class actions can be resolved. The Commission has concluded and, accordingly, recommends that any limitation period applicable to an action commenced under the proposed *Class Actions Act* should be suspended for the members of the class upon the commencement of the action.[56] We further recommend that the limitation period should resume running against a member of a class in the following circumstances: where he excludes himself from the class suit;[57] where an amendment to the class description in the order certifying the action as a class action excludes him from class membership;[58] except as to any party, upon a denial of certification or upon decertification of the action;[59] or where the action is dismissed without an adjudication on the merits.[60] We also recommend that, in these circumstances, the limitation period should resume running as soon as all rights of appeal have been exhausted or all appeals have been disposed of, as the case may be.[61] It will be noted that these recommendations are similar to the provisions of the Uniform Class Actions Act and the Quebec *Code of Civil Procedure.*

While no solution to the problem here discussed may work perfect justice in all cases, it is the view of the Commission that our recommendations will serve effectively the policies underlying both class action procedures and statutory limitation periods.

Recommendations

The Commission makes the following recommendations:

1. The proposed *Class Actions Act* should provide expressly that any limitation period applicable to an action commenced under that Act should be suspended for the members of the class upon the commencement of the action.

2. The limitation period should resume running against a member of a class in the following circumstances:

   (a) where he excludes himself from the class suit;

   (b) where an amendment to the class description contained in the order

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[56] See Draft Bill, s. 35(1).

[57] *Ibid.*, s. 35(1)(*a*).

[58] *Ibid.*, s. 35(1)(*b*).

[59] *Ibid.*, s. 35(1)(*c*).

[60] *Ibid.*, s. 35(1)(*d*). This situation could arise, for example, in two instances: first, as a result of a successful motion under r. 126 of the Supreme Court of Ontario Rules of Practice, R.R.O. 1980, Reg. 540, dismissing the action on the ground that it failed to disclose a reasonable cause of action, or was frivolous or vexatious; and secondly, where, pursuant to r. 322 of the Rules of Practice, the class action is dismissed for want of prosecution.

[61] See Draft Bill, s. 35(2).

certifying the action as a class action excludes him from class membership;

(c) except as to any party, upon a denial of certification or upon decertification; and

(d) where the action is dismissed without an adjudication on the merits.

3. For the purpose of Recommendation 2, the limitation period should resume running as soon as all rights of appeal have been exhausted or all appeals have been disposed of, as the case may be.

CHAPTER 20

THE SETTLEMENT AND DISCONTINUANCE OF CLASS ACTIONS

1. INTRODUCTION

As a general principle, the settlement of litigation is to be encouraged.[1] Like most individual actions, class actions are prime candidates for compromise; indeed, it has been suggested that in the United States most class actions are settled or discontinued prior to trial.[2] In the view of the Commission, the settlement of class actions is a particularly important issue and one that should be dealt with in the proposed *Class Actions Act*.[3]

In this chapter, we shall consider the issue of settlement and, in addition, the discontinuance of class actions and the dismissal of such actions for want of prosecution.[4] The chapter first will examine the present law under Rule 75 of the Supreme Court of Ontario Rules of Practice[5] and then outline the potential problems that could arise under the existing law with respect to settlement, discontinuance, and dismissal for want of prosecution. After examining the present law in Ontario, the chapter will turn to a consideration of the way in which the settlement, discontinuance, and dismissal of class actions have been dealt with in other jurisdictions, including the experience

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[1] In *Feder v. Harrington*, 58 F.R.D. 171 (S.D.N.Y. 1972), at 174, the policy underlying this principle was stated as follows:

> In the normal case, there is a public policy favoring settlement. This policy exists not only in the interests of judicial economy but also because litigants should be encouraged to determine their respective rights between themselves.

[2] Note, "Developments in the Law – Class Actions" (1976), 89 Harv. L. Rev. 1318, at 1536 (hereinafter referred to as "Harvard Developments"). See, also, *supra*, ch. 4, sec. 3(b)(i).

[3] See, for example, *ibid.*, where the authors of the Harvard Developments article remarked that, "[b]ecause of the pervasiveness of negotiation in the resolution of class suits, a class action procedure that does not take settlement into account is incomplete".

[4] Under the Supreme Court of Ontario Rules of Practice, R.R.O. 1980, Reg. 540, an action may be dismissed for reasons other than for want of prosecution: see, for example, r. 126. However, in this chapter when we refer to the "dismissal" of a class action, unless the context otherwise requires, the reference is to dismissal for want of prosecution.

[5] *Supra*, note 4.

gained under the United States federal court system. In conclusion, we shall state our recommendations.

2. THE PRESENT LAW IN ONTARIO

In discussing the present law in Ontario, it is desirable to distinguish between the settlement of the individual claim of a representative plaintiff and the settlement of the class claim.

(a) Settlement of the Representative Plaintiff's Individual Claim and Discontinuance or Dismissal of the Class Action

Where proceedings are commenced under Rule 75, it would appear that a representative plaintiff may settle his individual claim, and that, as between the representative plaintiff and the defendant, the settlement is as valid and enforceable as if the plaintiff had sued only on his own behalf. Furthermore, the representative plaintiff may discontinue a class suit under Rule 320 of the Rules of Practice.[6] In this event, whether or not the discontinuance of the action was precipitated by the settlement of the representative plaintiff's individual claim, the result would be to terminate the class action. However, to preclude this result, the court, on application, may appoint a member of the class as a substitute representative plaintiff.[7]

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[6] Supreme Court of Ontario Rules of Practice, *supra*, note 4. Rule 320 provides as follows:

> 320.-(1) The plaintiff may, at any time before receipt of the statement of defence of any defendant, or after the receipt thereof before taking any other proceeding in the action (save an interlocutory application), by notice in writing, filed and served, wholly discontinue his action against such defendant or withdraw any part thereof, and the defendant is entitled to the costs of the action, if wholly discontinued against him, or, if not wholly discontinued, to the costs occasioned by the part withdrawn (Form 31).
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> (2) A plaintiff may discontinue as to one or more of several defendants.
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> (3) Such costs may be taxed upon production of the notice served, and, if not paid within four days from taxation, the defendant may issue execution therefor.
>
> (4) Such discontinuance or withdrawal is not a defence to any subsequent action.
>
> (5) Except as provided by the preceding subrules, a plaintiff shall not discontinue without leave of the court, which may be granted upon such terms as to costs and as to any other action against all or any of the defendants and otherwise as are proper.

See, also, Province of Ontario, Ministry of the Attorney General, Civil Procedure Revision Committee, untitled report (June 1980), Proposed Rules of Civil Procedure, r. 25.01 (hereinafter referred to as "Williston Committee Rules").

[7] See *McPherson v. Gedge* (1883), 4 O.R. 246 (C.A.); *Re Ritz and Village of New Hamburg* (1902), 4 O.L.R. 639 (H.C.J.); and *Moon v. Atherton*, [1972] 2 Q.B. 435, [1972] 3 W.L.R. 57 (C.A.). But see *Abraham v. Prosoccer Ltd.* (1980), 31 O.R. (2d) 475, 119 D.L.R. (3d) 167 (H.C.J.) (subsequent references are to 31 O.R. (2d)). In this case, a shareholder brought an application for an order amending the style of cause in a class action to substitute himself as the named plaintiff. The original named plaintiff had initiated two representative proceedings – a shareholder's class action and an application to bring a

It is important to note that the settlement of the representative plaintiff's individual action, or the discontinuance of the class action within the time prescribed by the Rules,[8] requires neither court approval nor notification of the court or the absent class members. Further, it would appear that a defendant can terminate a class action by bringing a motion under Rule 322 of the Ontario Rules of Practice[9] to dismiss the class suit for want of prosecution. There is no provision in the Rules of Practice requiring the defendant to notify the absent class members of the motion. However, it appears that neither the settlement of the representative plaintiff's individual claim, nor the discontinuance of the class action, nor the dismissal of the action for want of prosecution will be binding upon the absent class members, who may institute another class action or initiate their own individual actions.

Although, in the circumstances mentioned above, absent class members have the right to bring a subsequent action or to request the court to appoint a substitute representative plaintiff, these remedies will be of no benefit if the class members have no knowledge of the state of the proceedings. As we have mentioned, under Rule 75 there is no duty to notify either the court or the absent class members of the settlement of the representative plaintiff's individual claim[10] or of the discontinuance or dismissal of the class action.[11] Even if the court were apprised of these circumstances, it is less than certain whether it would have the authority to order the representative plaintiff to notify the absent class members of his actions.[12]

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derivative action – which he subsequently had agreed to discontinue in return for a settlement of his own claim. The Court, in dismissing the application, held that, although it had a discretion to substitute the applicant as the representative plaintiff, it would not do so because of the applicant's lack of interest in the original class action, as well as the questionable *bona fides* of his application. See, also, Williams, "Consumer Class Actions in Canada – Some Proposals for Reform" (1975), 13 Osgoode Hall L.J. 1, at 82 (hereinafter referred to as "Williams Consumer Class Actions"), and *LaSala v. American Savings and Loan Association*, 97 Cal. Rptr. 849, 489 P.2d 1113 (S.C. 1971), where it was held that the representative plaintiff is, in effect, a fiduciary of the class members' interests and, therefore, has a duty to ensure that their interests are protected, notwithstanding satisfaction of his own claim.

[8] Leave of the court will be required only if the plaintiff proposes to discontinue the action outside the time fixed by r. 320(1) of the Supreme Court of Ontario Rules of Practice, *supra*, note 4. See, also, Williston Committee Rules, *supra*, note 6, r. 25.01(b).

[9] Supreme Court of Ontario Rules of Practice, *supra*, note 4, r. 322, provides as follows:

> 322. An action may be dismissed for want of prosecution where the plaintiff has failed,
>
> (*a*) to deliver his statement of claim within the time prescribed for so doing, or
>
> (*b*) to require that pleadings be noted closed against any defendant who is in default in delivering his statement of defence within ten days after such default.

See, also, Williston Committee Rules, *supra*, note 6, r. 26.01.

[10] The court would, of course, have knowledge if the settlement were reached at trial, or if the parties wished to incorporate the settlement in a final judgment.

[11] Except in the circumstance outlined in note 8, *supra*, in the case of a discontinuance where leave of the court is required.

[12] See Williams Consumer Class Actions, *supra*, note 7, at 82.

Although the duty of the representative plaintiff is to protect the interests of the class members, it is possible that, in the absence of adequate safeguards, he may be tempted to use the class action procedure as leverage to obtain a better settlement for himself. This potential abuse of the class action mechanism[13] may appeal to the defendant; it is likely to be less expensive than if the action were actually litigated, and it may avert adverse publicity. Such settlements are dangerous; not only do they constitute an abuse of the class action procedure, but they may also be prejudicial to class members who have relied on the class representative to pursue their interests.[14]

(b) Settlement of the Class Claim

Not only may a representative plaintiff settle his own individual claim, he may also agree with the defendant to settle the class claim. If a representative plaintiff were to reach a settlement agreement on behalf of the class, it would seem to follow that, under the present law, the settlement would be binding upon the absent class members.[15] Yet, there is no requirement that the representative plaintiff notify the class members of the agreement or afford them an opportunity to contest its terms. Nor is there any requirement that the settlement receive court approval. The potential consequences under the present law are apparent; despite good faith bargaining, the representative plaintiff and the defendant may arrive at a compromise that is inadequate or unfair and that is not in the best interests of the class. Furthermore, there exists the possibility that the parties may be in collusion and may therefore secure a more favourable settlement for the representative plaintiff than for the other class members.

(c) Summary

In the opinion of the Commission, the present law of Ontario with respect to the settlement, discontinuance and dismissal of class actions is unsatisfactory and raises a number of problems. As we have noted, there exists the possibility that a representative plaintiff may use the class action as leverage to obtain for himself an unduly favourable settlement of his individual claim. As there is no duty to notify absent class members of the settlement of the representative plaintiff's individual claim, or of the discontinuance or dismissal for want of prosecution of a class action, class members may not be alerted to the need to pursue their own claims. Further, the representative plaintiff may settle the class claim without notice to the court

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[13] See, for example, *Philadelphia Electric Co. v. Anaconda American Brass Co.*, 42 F.R.D. 324 (E.D. Pa. 1967), at 328, where the Court stated that "no litigant should be permitted to enhance his own bargaining power by merely alleging that he is acting for a class of litigants". See, also, *Surowitz v. Hilton Hotel Corp.*, 383 U.S. 363 (1966), at 371; *Shelton v. Pargo, Inc.*, 582 F.2d 1298 (4th Cir. 1978), at 1305 *et seq.*; *Yaffe v. Detroit Steel Corp.*, 50 F.R.D. 481 (N.D. Ill. 1970), at 483; and *Shapiro v. Magaziner*, 210 A.2d 890 (S.C. Pa. 1965), at 895.

[14] See McGough and Lerach, "Termination of Class Actions: The Judicial Role" (1972), 33 U. Pitt. L. Rev. 445, at 448.

[15] See Williams Consumer Class Actions, *supra*, note 7, at 82. See, also, *Rodgers v. United States Steel Corp.*, 70 F.R.D. 639 (W.D. Pa. 1976), at 642.

or to the absent class members. Although the settlement may be inadequate or unfair, it would seem to bind all members of the class.

One further point should be made. Concern has been expressed in the United States that a class lawyer may be tempted to settle a class action for an amount that is inadequate in order to maximize his fee. This matter is discussed in greater detail in chapters 4 and 17 of the Report. Suffice it to state that this possibility is an additional factor that argues in favour of amending the present law with respect to settlement.

It is apparent that the settlement, discontinuance, or dismissal of class actions may affect the rights of persons who are not before the court. Fairness, therefore, would seem to require the imposition of an affirmative duty on both the representative plaintiff and the court to ensure that the interests of all class members are adequately protected. Indeed, in areas of provincial law other than class actions, the interests of absent litigants have been recognized and remedied. We turn now to consider the settlement and discontinuance procedures employed in derivative actions commenced under section 97 of the *Business Corporations Act*,[16] and in actions initiated on behalf of infants.

(d) Settlement and Discontinuance of Derivative Actions and Infant Actions

(i) Derivative Actions

Under section 97 of the *Business Corporations Act*,[17] minority shareholders may initiate a derivative action in a representative capacity on behalf of themselves and all other shareholders of the corporation, other than alleged wrongdoers, to enforce any right, duty, or obligation owed to the corporation. Section 97(6) of the Act provides as follows:[18]

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[16] R.S.O. 1980, c. 54.

[17] *Ibid.* See *supra*, ch. 2, sec. 2(c)(iv)a. and ch. 5, sec. 3(b)(ii)b., for a more detailed discussion of this section of the *Business Corporations Act*.

[18] Unfortunately, there is a paucity of case law and literature that discusses this subsection. One recent Ontario Supreme Court decision, *Abraham v. Prosoccer Ltd., supra*, note 7, however, addressed itself to the timing of the operation of s. 97(6). In this case, Reid J. held, at 480, that, "s-s. (6) does not apply to a motion for leave [to bring a derivative action] but applies only to an action for which leave has been granted".

However, if the *Business Corporations Act, 1981,* Bill 6, 1981 (32d Ont. Leg. 1st Sess.), discussed *supra*, ch. 5, sec. 3(b)(ii)b., which received second reading on October 20, 1981, were implemented, the decision of Reid J. in this regard would effectively be overruled. Bill 6 contains the following subsection with respect to the settlement and discontinuance of derivative actions (emphasis added):

> 248.-(2) *An application made* or an action brought or intervened in under this Part shall not be stayed, discontinued, settled or dismissed for want of prosecution without the approval of the court given upon such terms as the court thinks fit and, if the court determines that the interests of any complainant may be substantially affected by such stay, discontinuance, settlement or dismissal, the court may order any party to the application or action to give notice to the complainant.

See, also, *Canada Business Corporations Act*, S.C. 1974-75-76, c. 33, where court approval for the discontinuance or settlement of an action or application under Part XIX of the Act is required by s. 235(2).

> 97.-(6) An action commenced under this section shall not be discontinued, settled or dismissed for want of prosecution without the approval of the court and, if the court determines that the interests of the shareholders or any class thereof may be substantially affected by such discontinuance, settlement or dismissal, the court, in its discretion, may direct that notice in manner, form and content satisfactory to the court shall be given, at the expense of the corporation or any other party to the action as the court directs, to the shareholders or class thereof whose interests the court determines will be so affected.

Section 97(6) was enacted by the Legislature to implement recommendations contained in the *Interim Report of the Select Committee on Company Law*, sometimes referred to as the "Lawrence Report".[19] In that Report, the Select Committee reviewed the existing law, which permitted the settlement, discontinuance, or dismissal for want of prosecution of a derivative action without prior court approval.[20] The Select Committee, after considering this practice, particularly in the context of the procedures that controlled certain derivative actions in American jurisdictions, decided to recommend that the amended *Business Corporations Act* "contain a provision comparable to that in the New York Business Corporation Law and in the law of many of the United States to the effect that any derivative action so brought shall not be discontinued, compromised or settled without the approval of the court, in the hope that 'secret settlements' shall not be made".[21]

(ii) Infant Actions

At present in Ontario, an infant must sue by his "next friend",[22] who is

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[19] On June 22nd, 1965, the Premier of Ontario moved the appointment of a Select Committee of the Legislative Assembly with the following terms of reference: "to inquire into and review The Corporations Act of the province of Ontario and related Acts and regulations, including The Corporations Information Act and The Mortmain and Charitable Uses Act, and to consider the principles of the incorporation, operation, management and dissolution of corporations, including co-operatives, together with the legislation of other jurisdictions relating to the same matters": see Province of Ontario, *Interim Report of the Select Committee on Company Law* (1967), at (i) (hereinafter referred to as "*Interim Report*"). See, also, Lavine, *The Business Corporations Act . . . An Analysis* (1971).

[20] See *In re Alpha Co. Ltd.*, [1903] 1 Ch. 203.

[21] *Interim Report, supra*, note 19, at 64. In its *Interim Report*, at 62-63, the Select Committee commented as follows:

> As is well known, derivative actions in company law matters are common in the various United States and are the subject of statutory attention in a number of important American jurisdictions . . . . [P]laintiffs frequently threaten to bring derivative actions or in fact commence them solely for the purpose of provoking secret settlements with the companies even in circumstances where the action is not well founded. In the result, the derivative action has achieved a notable degree of unpopularity in Canada and elsewhere. There is no doubt that this unpopularity is merited in many instances as the actions which have been commenced are frequently of an harrassing [*sic*] nature, brought in the hope that a judgment will carry with it a substantial award for lawyers' fees and expenses as is expressly permitted by the statutes of many States. The Committee is satisfied, however, that the undesirable characteristics of the derivative action can be avoided and that the remedy is one which can and should be adapted to Ontario law and practice to serve as an effective procedure whereby corporate wrongs can be put right.

[22] Supreme Court of Ontario Rules of Practice, *supra*, note 4, r. 92.

considered to be an officer of the court and not a true party to the action.[23] The purpose of "having a next friend represent an infant in court proceedings is to ensure the due conduct thereof and to protect adverse parties against costs".[24] The next friend is not entitled to be compensated for his services, and he or she cannot have any interest in the infant's cause of action, or in the actual judgment.[25]

What is of particular interest, however, is the fact that a next friend cannot consent to any settlement of the action without the court's approval,[26] and further, that the court will not confirm a settlement until it is satisfied that the agreement is in the best interests of the child.[27] Furthermore, if a next friend declines a settlement proposed by counsel, and the court considers the agreement to be reasonable and appropriate, it has the jurisdiction to dismiss the next friend and to substitute the Official Guardian in his place.[28] In addition, a next friend is not permitted to abandon either his financial responsibilities or the conduct of the action without the court's approval.[29]

Rule 7.07 of the Rules of Civil Procedure proposed by the Civil Procedure Revision Committee appears to codify the common law with respect to the compromise of infant actions. It provides, in part, as follows:[30]

> 7.07(1) No settlement or compromise of any claim made by or on behalf of a person under disability, whether or not any proceeding has been commenced in respect of that claim, is binding upon him and no judgment may be obtained against him by default or on consent without the approval of a judge.

The Rule, therefore, would apply not only to the settlement of infants' actions, but to the compromise of any claim brought on behalf of a "person under disability".[31]

(iii) Conclusions

As the above discussion indicates, in other areas of provincial law the interests of persons not before the court have been recognized and protected.

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[23] *Lucas v. Coupal* (1930), 66 O.L.R. 141, [1931] 1 D.L.R. 391 (H.C. Div.). See, also, Wilson, *Children and the Law* (1978), at 153.

[24] *Re Miszczuk*, [1949] O.W.N. 409 (H.C.J.), at 410.

[25] *Fidelity Trust Co. v. Buchner* (1912), 26 O.L.R. 367, 5 D.L.R. 282 (H.C. Div.).

[26] In order to approve a settlement, the court will require the submission of the following evidence, where appropriate, to form part of the record: a medical report; evidence of out-of-pocket expenses; and affidavits of the child's solicitor and the next friend, indicating that the settlement is for the child's benefit: see *Poulin v. Nadon*, [1950] O.R. 219, [1950] O.W.N. 163 (C.A.).

[27] See, for example, *Rhodes v. Swithenbank* (1889), 22 Q.B.D. 577 (C.A.), at 578, and *Vano v. Canadian Coloured Cotton Mills Co.* (1910), 21 O.L.R. 144 (H.C. Div.), at 148-49.

[28] *Panzavecchia v. Piche*, [1972] 2 O.R. 811, 26 D.L.R. (3d) 690 (H.C.J.).

[29] *Smith v. Craig*, [1955] O.W.N. 995 (H.C.J.). See, also, Wilson, *supra*, note 23, at 154.

[30] Williston Committee Rules, *supra*, note 6. See, also, r. 7.07(2)-(6).

[31] See Williston Committee Rules, *supra*, note 6, r. 7.01, which deals with the commence-

The general scheme that has evolved is that the settlement or discontinuance of an action will not be permitted without, at the very least, judicial approval and, in certain cases, notice to the affected absent persons.

3. THE PRESENT LAW IN THE UNITED STATES FEDERAL COURT SYSTEM

In the United States federal court system, Rule 23(e) of the Federal Rules of Civil Procedure[32] governs the settlement and discontinuance of class actions.[33] It provides as follows:

> 23(e) A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

According to this subdivision, it would appear that a class action commenced under Rule 23 cannot be discontinued[34] or settled without the parties first seeking court approval and without notice of the proposed settlement or dismissal being given to the absent class members.[35]

While Rule 23(e) deals expressly with the dismissal and settlement of a "class action",[36] there are two important issues that require further comment.

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ment, continuation, or defence of proceedings in the case of "persons under disability". And see Supreme Court of Ontario Rules of Practice, *supra*, note 4, rr. 95-101.

[32] Fed. R. Civ. P. 23, promulgated at 383 U.S. 1029 (1966).

[33] The Ninth Circuit Court of Appeals, in *Norman v. McKee*, 431 F.2d 769 (1970), at 774, commented on the objective of Rule 23(e) as follows:

> The reason for [Rule 23(e)] is obvious. Because the rights of many persons are at stake who are parties to the action only through their representative, a settlement negotiated between the named parties may not give due regard to the interests of those unnamed.

[34] Fed. R. Civ. P. 41(a), which deals with the voluntary dismissal of an action, appears equivalent to r. 320 of the Ontario Rules of Practice, which governs the discontinuance of an action. Rule 41(b) regulates involuntary dismissal, including dismissal for failure of the plaintiff to prosecute the action, a matter that is the subject of r. 322 of the Ontario Rules of Practice. In the construction of Rule 23(e), some courts have held that "a dismissal for failing to prosecute does not require notice because of its involuntary character": see Wright and Miller, *Federal Practice and Procedure* (1972), Vol. 7A, §1797, at 236.

[35] The predecessor to subdivision (e) similarly required court approval before a class suit could be compromised or dismissed. The only difference between the two sections lies in the notice requirement. Under the original 1938 provision – Rule 23(c) – notice was mandatory only in the case of a "true" class action, because the judgment in such an action, whether favourable or not, bound all class members: see Wright and Miller, *ibid.*, §1797, at 233. In "spurious" and "hybrid" class suits, however, notice was required only if the court so directed: see Wright and Miller, *ibid.* Under revised Rule 23, because of the abolition of these class action categories and the extension of the *res judicata* effect of a class action judgment to all types of class suit, notice to all class members of a settlement or a dismissal of the action was made mandatory: see Wright and Miller, *ibid.*, §1797, at 233-34.

[36] Accordingly, it has been held that Rule 23(e) is not applicable to settlements of the individual claims of absent class members: see *Weight Watchers of Philadelphia, Inc. v. Weight Watchers International, Inc.*, 455 F.2d 770 (2d Cir. 1972); *Rodgers v. United States Steel Corp., supra*, note 15; and *Nesenoff v. Muten*, 67 F.R.D. 500 (E.D.N.Y. 1974).

First, the Rule fails to state expressly whether a dismissal or a settlement that occurs after the initiation of the class suit but prior to certification falls within its purview. Secondly, the Rule does not set out the procedure to be followed by a court when presented with a settlement agreement of the class claim in either a pre-certification or a post-certification context. We turn now to a consideration of these issues.

(a) The Problem of Pre-Certification Settlements

Prior to certification, a representative plaintiff who has instituted a class action may wish to settle his individual claim and discontinue the class action or, alternatively, he may wish to settle the claim of the entire class. The question that has arisen is whether Rule 23(e) applies in such situations. The difficulty exists because the Rule refers to a "class action", and there is a question whether proceedings that are brought on behalf of a class can be regarded as a class action within the meaning of the Rule before the court has determined whether the action may be maintained as a class action.

(i) Settlement of the Class Claim

The issue whether Rule 23(e) applies to pre-certification settlements of the entire class claim was addressed specifically in *Philadelphia Electric Co. v. Anaconda American Brass Co.*[37] In that case, the plaintiffs initiated a class suit against thirteen defendants alleging a conspiracy in violation of the federal antitrust laws. Prior to certification, the representative plaintiffs negotiated a class settlement with three of the defendants and moved before the district court for approval of the settlement. The Court noted that the proposed settlement attempted "to compromise the claims of the class, not just the named plaintiffs"[38] and, in holding that approval of the proposed settlement would have to be postponed pending the determination of the certification question,[39] stated as follows:[40]

> [W]hatever uncertainties exist as to the precise status of *an action brought as a class action*, during the interim between filing and the 23(c)(1) determination by the court, *it must be assumed to be a class action for purposes of dismissal or compromise* under 23(e) unless and until a contrary determination is made under 23(c)(1).

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[37] *Philadelphia Electric Co. v. Anaconda American Brass Co., supra*, note 13. See, also, *Kahan v. Rosenstiel*, 424 F.2d 161 (3d Cir. 1970), *cert.* denied 398 U.S. 950 (1970); and *Ace Heating & Plumbing Co. v. Crane Co.*, 453 F.2d 30 (3d Cir. 1971).

[38] *Philadelphia Electric Co. v. Anaconda American Brass Co., supra*, note 13, at 327.

[39] *Ibid.*, at 326-27, where the Court commented as follows:

> Rule 23(c)(1) contemplates a prompt determination after the filing of the action. If a negative determination is made, no cognizable permanent harm is done by delaying compromise settlements in anticipation of the possible applicability of Rule 23(e). If the determination is affirmative, then there are absent parties whose rights should not have been permanently affected without notice.

[40] *Ibid.*, at 326 (emphasis added).

Accordingly, it appears that the requirements of Federal Rule 23(e) apply to a pre-certification settlement of the class claim.

In order to avoid postponing court approval of a proposed pre-certification settlement of the class claim until after certification, a particular settlement technique has been employed. This technique, referred to as the "tentative settlement class"[41] or "the temporary settlement class",[42] enables the parties to avoid the certification procedure by providing in the settlement agreement that, for the purpose of the compromise, the defendant agrees to the existence of a valid class. In addition, as a term of the settlement, the parties negotiate the definition of the class. While this technique has been used successfully in a number of cases,[43] it remains a source of controversy among the judiciary and class action commentators.[44]

(ii) Settlement of the Representative Plaintiff's Individual Claim and Dismissal of the Class Action

While it appears that the requirements of Rule 23(e) apply to a pre-certification settlement of the class claim, it is unsettled whether this provision is applicable to a pre-certification settlement of the representative plaintiff's individual claim where the plaintiff brings a motion to dismiss, that is, to discontinue either the class aspect of the action or the action itself. The reported cases that address this issue fall roughly into three categories.

First, there are cases that hold that Rule 23(e) is applicable and, therefore, that both approval and notice are required.[45] In so holding, courts have offered as reasons both the possibility of reliance by absent class members and the prevention of abuse of the class action device.[46]

A second category of cases has applied the requirements of Rule 23(e) to pre-certification settlements of the representative plaintiff's individual claim only in certain instances. In these cases,[47] when asked to consider such a

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[41] See Federal Judicial Center, Board of Editors, *Manual for Complex Litigation* (1978) (Clark Boardman), §1.46, at 88-91 (hereinafter referred to as "Manual"). And see Harvard Developments, *supra*, note 2, at 1555-60.

[42] Newberg, *Newberg on Class Actions* (1977), Vol. 3, §5570c, at 473-80.

[43] See, for example, the cases cited in Harvard Developments, *supra*, note 2, at 1555, *n.* 105.

[44] See, for example, Manual, *supra*, note 41, §1.46, at 88-90, which is strongly opposed to such a practice. Compare *City of Detroit v. Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974), at 464-66, in support of tentative settlement classes. For further support of the technique, see Newberg, *supra*, note 42, Vol. 3, §5570c, at 475-80. See, also, Harvard Developments, *supra*, note 2, at 1557-58.

[45] See *Duncan v. Goodyear Tire and Rubber Co.*, 66 F.R.D. 615 (E.D. Wis. 1975); *Rotzenburg v. Neenah Joint School District*, 64 F.R.D. 181 (E.D. Wis. 1974); *Rothman v. Gould*, 52 F.R.D. 494 (S.D.N.Y. 1971); and *Yaffe v. Detroit Steel Corp., supra*, note 13.

[46] See, for example, *Yaffe v. Detroit Steel Corp., ibid.*, at 483. See, also, *Rothman v. Gould, supra*, note 45, at 496.

[47] See *Muntz v. Ohio Screw Products*, 61 F.R.D. 396 (N.D. Ohio 1973), and *Berger v. Purolator Products, Inc.*, 41 F.R.D. 542 (S.D.N.Y. 1966). See, also, *Held v. Missouri Pacific Railroad Co.*, 64 F.R.D. 346 (S.D. Tex. 1974), and *Elias v. National Car Rental System, Inc.*, 59 F.R.D. 276 (D. Minn. 1973).

settlement and a motion for dismissal, the courts have engaged in an expedited preliminary ruling on the certification issue. Where the result of the ruling was that the action would not have been certified, class notice of the settlement and dismissal was not ordered because the presumed application of Rule 23(e) was rebutted.

Lastly, a more recent line of cases has adopted a "functional" approach to this issue.[48] While these cases are in agreement that the court approval requirement of Rule 23(e) is mandatory in all instances, they state that notice should be ordered only if warranted by the facts of the individual case. Generally, the cases provide that, if it can be shown that in reaching the proposed settlement of the representative plaintiff's individual claim there has not been any abuse of the class action device and, in addition, that there exists no danger of prejudice to the putative class members, notice should not be required.[49]

(b) General Procedure for Settlement of the Class Claim

While Rule 23(e) states that, before a class action can be either dismissed or compromised, court approval is required, it does not provide any guidance with respect to the proper scope of review, the standards to be used, or the manner in which these standards should be applied. Apparently, the develop-

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[48] See *Shelton v. Pargo, Inc., supra*, note 13; *Jaen v. New York Telephone Co.*, 81 F.R.D. 696 (S.D.N.Y. 1979); *Johnson v. Wentz Equipment Co.*, 18 FEP Cas. 1499 (D. Kan. 1977); and *Magana v. Platzer Shipyard, Inc.*, 74 F.R.D. 61 (S.D. Tex. 1977).

[49] The Court of Appeals for the Fourth Circuit in *Shelton v. Pargo, Inc., supra*, note 13, at 1315-16, discussed the application of the functional approach as follows:

> We do not undertake to identify all the varying circumstances to be evaluated by the District Court in exercising its discretion in this connection. We confine ourselves merely to deciding that, in the pre-certification settlement context of an action begun as a class action, a District Court is not automatically obligated to order notice to all putative class members under the terms of 23(e) but should, after proper inquiry, determine whether the proposed settlement and dismissal are tainted by collusion or will prejudice absent putative members with a reasonable 'reliance' expectation of the maintenance of the action for the protection of their interests. If it determines both issues in the negative, the District Court may approve the settlement. Such a result would serve the interests of the public in the orderly disposition of litigation and would relieve the court of the burden of an unnecessary time-consuming trial. Should it find, on the other hand, that the settlement was tainted or will prejudice the putative class members with a reasonable 'reliance' expectation, it should hold a certification hearing and, if it certificates [*sic*] a class, should order notice to the members of the class so defined. Of course, if the District Court finds that class certification is not in order, it should dismiss the action in any event.

The "functional" approach has received considerable support from various class action commentators. See, for example, Fylstra, "Settlement of Class Action Cases Prior to Class Certification" (1980), 69 Ill. B.J. 24, at 30. See, also, Newberg, *supra*, note 42, §4950, Vol. 3, at 405-06; Harvard Developments, *supra*, note 2, at 1541-46; Miller, *An Overview of Federal Class Actions: Past, Present and Future* (2d ed., 1977), cited in *Shelton v. Pargo Inc., supra*, note 13, at 1310; Comment, "The Applicability of Rule 23(e) to Precertification Proceedings: The Functional Approach Applied" (1979-80), 25 Vill. L. Rev. 487; and Almond, "Settling Rule 23 Class Actions at the Pre-Certification Stage: Is Notice Required?" (1978), 56 N.C. L. Rev. 303.

ment of adequate settlement procedures has been left primarily to the courts, although the *Manual for Complex Litigation*[50] has devoted a section to this topic.

We understand that, as a matter of practice, when the parties to a class action agree to settle, they normally prepare and execute a "joint stipulation of settlement" or a "memorandum of agreement", which is submitted to the court for approval.[51] In such an agreement, the parties specify the essential terms of the settlement, including, for example, the amount of the settlement fund, the form of payment, and the manner of determining the effective date of settlement.[52] In addition to the joint stipulation, the parties often submit briefs to the court containing "a summary of the action and the proposed settlement, a history of the prior proceedings, the factual background of the case, the issues of law involved, the allegations and the evidence, in support or contra, the provable damages, and the adequacy of the settlement".[53] Counsel for the representative plaintiff ordinarily will file a petition for allowance of fees and costs from the settlement fund. The submission of this document often is required by the court so that it can schedule a joint hearing for approval of both the settlement and the fee petition, and in order that the absent class members will be able to estimate their net recoveries.[54]

Before advising the absent class members of the proposed settlement agreement, the court normally will engage in a type of pre-trial conference in order to ascertain whether the agreement is within the range of possible approval.[55] Unless the court believes that it may ultimately approve the settlement, it would be pointless to incur the expense and effort of notifying the class. The *Manual for Complex Litigation*, however, stresses that a hearing of this type should never replace the function of the actual settlement hearing.[56]

Once it has been determined that the proposed settlement is within the range of possible approval, notice will be given to the class. Generally, this notice[57] will advise the class members of the proposed settlement and of the

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[50] Manual, *supra*, note 41, §1.46, at 80-95.

[51] See, for example, *In re Antibiotic Antitrust Actions*, 410 F. Supp. 669 (D. Minn. 1974). See, generally, Newberg, *supra*, note 42, Vol. 3, §5570, at 469-71.

[52] *In re Antibiotic Antitrust Actions, supra*, note 51.

[53] Newberg, *supra*, note 42, Vol. 3, §5570, at 470, *n*. .06.

[54] *Ibid.*, at 470.

[55] See, for example, *In re Antibiotic Antitrust Actions, supra*, note 51. See, generally, Bartsh, Boddy, King, and Thompson, *A Class-Action Suit That Worked: The Consumer Refund in the Antibiotic Antitrust Litigation* (1978), at 12-13. And see Forde, "Settlement of the Class Action" (1978), 5 Litigation 23.

[56] Manual, *supra*, note 41, §1.46, at 82.

[57] Forde, *supra*, note 55, at 24, states that items that should be contained in the notice include the following: "identification of the action; an adequate description of the terms of the settlement, including claims settled, consideration and distribution of the settlement, including disposal of unclaimed sums; availability of papers for inspection; date, time and place of the hearing; application for attorneys' fees; and effect of judicial approval of the proposed settlement". In addition, the notice usually provides that a

options that are available to them – objecting to the settlement, opting out of the settlement agreement in cases where the class members have not already been given an opportunity to exclude themselves,[58] or remaining silent, in which case they will be bound by the agreement if it is ultimately approved by the court.[59] The manner of notifying the class members is entirely within the discretion of the court. The court, for example, could order notice by mail to all identified members of the class, together with general notice by publication.[60]

The court then may hold a settlement hearing[61] at which absent class members may appear. The type of hearing is entirely discretionary, but it has been held, for example, that the court should not convert the settlement hearing into a full blown trial on the merits, because " 'the very purpose of compromise is to avoid the delay and expense of such a trial' ".[62] At the hearing, evidence will be adduced in support of, and in opposition to, the proposed settlement agreement, and it is the court's duty to weigh this evidence objectively and independently. Generally, the court is required to determine whether the agreement is fair, reasonable, adequate, and in the best interests of the class members.[63] In determining this issue, the courts have

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class member's objection will not be entertained at the settlement hearing if the objection is not initially made in writing and filed with the clerk of the court: see, for example, *State of West Virginia v. Chas. Pfizer & Co., Inc.*, 314 F. Supp. 710 (S.D.N.Y. 1970), aff'd 440 F.2d 1079 (2d Cir. 1971), *cert.* denied 404 U.S. 871 (1971). And see Newberg, *supra*, note 42, Vol. 3, §5580, at 481. Furthermore, it is important that the notice clearly indicate that the court is not expressing any view with respect to the merits of the settlement agreement: see, for example, *Grunin v. International House of Pancakes*, 513 F.2d 114 (8th Cir. 1975), at 122, *cert.* denied 423 U.S. 864 (1975). See, also, Moore, *Federal Practice* (2d ed., 1980), Vol. 3B, ¶23.80[3], at 23-514.

[58] Newberg, *supra*, note 42, Vol. 3, §5580, at 481, states as follows: "When no prior notice of the pendency of the (b)(3) class action is given, the rights of absent class members to exclude themselves from the action under 23(c)(2) are preserved by combining the notice of settlement hearing together with notice of opportunity for exclusion from the action." With respect to opting out of a pre-certification settlement, Newberg comments as follows in Vol. 3, §5570c, at 477: "Because absent class members in a (b)(3) class action have the right, after notice is given, to exclude themselves from the action, this right is not lost when 23(e) provisions for notice of a proposed class settlement are invoked before the court has reached its initial class ruling."

[59] *Philadelphia Housing Authority v. American Radiator and Standard Sanitary Corp.*, 323 F. Supp. 364 (E.D. Pa. 1970), at 373, aff'd *sub nom. Ace Heating & Plumbing Co. v. Crane Co., supra*, note 37.

[60] See, for example, *Greenfield v. Villager Industries, Inc.*, 483 F.2d 824 (3d Cir. 1973).

[61] See, for example, *Pearson v. Ecological Science Corp.*, 522 F.2d 171 (5th Cir. 1975), *cert.* denied 425 U.S. 912 (1976), and *Kohn v. American Metal Climax, Inc.*, 489 F.2d 262 (3d Cir. 1973). In *Patterson v. Stovall*, 528 F.2d 108 (7th Cir. 1976), the Court rejected objecting class members' arguments that the trial court's failure to hold a settlement hearing was an abuse of discretion. But see *Calhoun v. Cook*, 487 F.2d 680 (5th Cir. 1973), at 682.

[62] *Young v. Katz*, 447 F.2d 431 (5th Cir. 1971), at 433. See, also, *Stull v. Baker*, 410 F. Supp. 1326 (S.D.N.Y. 1976).

[63] See, for example, *Young v. Katz, supra*, note 62; *Wainwright v. Kraftco Corp.*, 53 F.R.D. 78 (N.D. Ga. 1971); *Amalgamated Meat Cutters & Butcher Workmen of North America v. Safeway Stores, Inc.*, 52 F.R.D. 373 (D.C. Kan. 1971); and *Zerkle v. Cleveland-Cliffs Iron Co.*, 52 F.R.D. 151 (S.D.N.Y. 1971). And see Manual, *supra*, note 41, §1.46, at 83.

taken into account a number of factors, some of which should be briefly mentioned.[64]

One factor that the court considers initially is whether the proposed compromise was the result of good faith bargaining conducted at arms-length.[65] If the court should decide that the settlement negotiations were not free from fraud or collusion, the agreement will not be approved.[66] Inadequate discovery has also resulted in the withholding of approval, for before a court can make a determination with respect to the reasonableness of a settlement, it must be fully apprised of the facts of the case.[67] Another factor considered by the courts in evaluating the fairness of a class action settlement is the strength of the representative plaintiff's case compared with the amount offered in the settlement.[68]

Courts have also taken into account the absence of objectors to a class action settlement. This factor, however, has been interpreted in two different ways. In a number of cases, the absence of objectors has been taken by the court to signify an overall acceptance of the settlement by the class members.[69] Other cases, however, have held that the absence or small number of

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[64] Other elements that have been taken into account by the courts in determining the appropriateness of settlement include the likely expense of continuing the litigation and its anticipated duration: see, for example, *Milstein v. Werner*, 57 F.R.D. 515 (S.D.N.Y. 1972), and *Derdiarian v. Futterman Corp.*, 38 F.R.D. 178 (S.D.N.Y. 1965). The solvency of the defendants is another element that has been considered by the court: see, for example, *City of Detroit v. Grinnell Corp.*, 356 F. Supp. 1380 (S.D.N.Y. 1972), aff'd 495 F.2d 448 (2d Cir. 1974). With respect to these factors and others, see Newberg, *supra*, note 42, Vol. 3, §5610, at 496-507, and Comment, "Factors Considered in Determining the Fairness of a Settlement" (1974), 68 Nw. U. L. Rev. 1146.

[65] See, for example, *Percodani v. Riker-Maxson Corp.*, 50 F.R.D. 473 (S.D.N.Y. 1970), at 477.

[66] See, for example, *Held v. Missouri Pacific Railroad Co., supra*, note 47, and *Greenfield v. Villager Industries, Inc., supra*, note 60.

[67] For example, in *Percodani v. Riker-Maxson Corp., supra*, note 65, the Court refused to sanction the proposed settlement partly because it was dissatisfied with the scope of discovery conducted by counsel. See, also, *Weiss v. Chalker*, 55 F.R.D. 168 (S.D.N.Y. 1972), at 169, where the Court postponed its decision with respect to the adequacy of the settlement pending further discovery and commented as follows:

> The Court may, and indeed must, when it is not satisfied that the tools for measuring the adequacy of the settlement have been supplied, order further discovery. There can, of course, be no precise measuring rod; but unless the District Court has available to it either hard facts or a rational explanation for inability to discover them, it does not know the range of appropriate settlement and it is flying blind.

[68] In *Kurach v. Weissman*, 49 F.R.D. 304 (S.D.N.Y. 1970), at 305, for example, the Court approved a settlement of a derivative class action, commenting that "[t]he likelihood of success does not appear to be strong". In *Percodani v. Riker-Maxson Corp., supra*, note 65, at 478, however, the same Court refused to approve a settlement agreement primarily because "greater success for the plaintiffs than that offered by the proposed compromise [appeared] quite possible". Closely allied to the "likelihood of success" factor is the "legitimate defence" factor. Courts have often sanctioned settlements providing for a substantially lower recovery than originally sought by the plaintiffs on the basis that the defendants had presented "sufficiently meritorious" defences to the claim: see, for example, *Schimmel v. Goldman*, 57 F.R.D. 481 (S.D.N.Y. 1973).

[69] See, for example, *Altman v. Liberty Equities Corp.*, 54 F.R.D. 620 (S.D.N.Y. 1972), and *Derdiarian v. Futterman Corp., supra*, note 64.

objections only has the effect of increasing the trial judge's responsibility to safeguard the interests of the absent class members.[70] The latter interpretation may be supported by the argument that the failure of absent class members to oppose the proposed settlement does not necessarily connote approval, but rather that the absent class members may have neither the sophistication nor the financial resources to protect their interests by participating in the settlement hearing.[71] In addition to these factors, the court will, of course, take into account whatever objections[72] have been raised by the absent class members, who normally have the right to present evidence at the settlement hearing[73] and who may first, having obtained the court's approval, have engaged in discovery relating to the proposed compromise.[74]

The terms of any settlement agreement ultimately approved by the court will be binding upon the members of the class, as defined by the court, with the exception of those class members who have previously opted out of an action commenced under Rule 23(b)(3). Only class members who have intervened or appeared in response to the notice of settlement and raised their objections will be permitted to appeal.[75] Since approval of a settlement is a

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[70] As noted by the Court in *Heddendorf v. Goldfine*, 67 F. Supp. 915 (D. Mass. 1958), at 926, the "silence or absence of [class members] does not relieve the judge of his duty. Indeed, it may charge him with added responsibility." See, also, *Norman v. McKee*, 290 F. Supp. 29 (N.D. Cal. 1968), aff'd 431 F. 2d 769 (9th Cir. 1970).

[71] Comment, "Factors Considered in Determining the Fairness of a Settlement", *supra*, note 64, at 1153.

[72] Courts have occasionally approved settlements notwithstanding substantial opposition by absent class members. For example, in *Bryan v. Pittsburgh Plate Glass Co.*, 494 F.2d 799 (3d Cir. 1974), at 803, although more than 20% of the class members actively opposed the proposed settlement agreement, it was approved. For a discussion of the grounds upon which a settlement may be challenged, see Newberg, *supra*, note 42, Vol. 3, §5660e, at 570-71.

[73] See, for example, *Cohen v. Young*, 127 F.2d 721 (6th Cir. 1942), *cert.* denied 321 U.S. 778 (1944); *Greenfield v. Villager Industries, Inc., supra*, note 60; *City of Detroit v. Grinnell Corp., supra*, note 44; and *Glicken v. Bradford*, 35 F.R.D. 144 (S.D.N.Y. 1964). Generally, if an evidentiary hearing is held, class members who have filed objections may appear and "cross-examine the proponents' witnesses, refute the representations of counsel and affirmatively present their own position": Forde, *supra*, note 55, at 26. In order to assist the court in evaluating not only the merits of the absent class members' objections but, more generally, the overall fairness and adequacy of the proposed settlement, an expert may be called upon. For example, the court could request the Securities and Exchange Commission to comment on the fairness of a securities settlement: see Harvard Developments, *supra*, note 2, at 1571, *n.* 201. Other government agencies or private associations may also be asked by the court to assist in the review of a settlement and to provide technical data needed by the court to evaluate the proposed compromise: see *Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974). If the case is particularly complicated, the court may appoint its own expert: see Manual, *supra*, note 41, §1.46, at 86-87, where it is recommended that the court should obtain economic information prior to evaluating an antitrust settlement and that a court-appointed expert could be of invaluable assistance in providing and analyzing such data.

[74] In deciding whether to permit discovery by an objector, the court will consider such factors as the nature and amount of previous discovery, and the number and the respective interests of the objectors: see, for example, *Zerkle v. Cleveland-Cliffs Iron Co., supra*, note 63.

[75] See *Research Corp. v. Asgrow Seed Co.*, 425 F. 2d 1059 (7th Cir. 1970), at 1060-61. The fact that an objecting class member has failed to opt out of the proposed settlement will not affect his right of appeal: see *Ace Heating & Plumbing Co. Inc. v. Crane Co., supra*, note 37.

discretionary order, it will be reversed on appeal only upon a clear showing that the district court abused its discretion.[76]

A settlement fund will not be administered until after the final judgment has been entered and all appeals have been heard and decided, or the requisite time period for the bringing of an appeal has expired. The court is required to retain jurisdiction until all settlement proceedings have been finalized and the fund actually distributed.[77] Although the court has general supervisory powers over settlements, it normally does not administer their distribution. This task is usually delegated to either a special master, the plaintiff's counsel, or to a committee of counsel.[78]

In order to qualify for a share of the settlement, class members will be required to file proofs of claim within a stipulated time period.[79] The request and procedure for filing proofs of claim is often set out in the original Rule 23(e) settlement notice, the proof of claim form being attached to the notice. Any class member who files a claim that is either rejected or reduced is entitled to notice of this fact and may be permitted to file an amended claim within a specified time period or to appeal the reduction or rejection.[80]

Should there be a residue after all proof of claim forms have been submitted and reviewed, the distribution of this residue will depend upon the terms of the settlement. If, for example, the settlement contains a recapture clause, the defendant will be entitled to an unconditional return of the surplus. On the other hand, the parties may agree that any residue of the fund should be distributed in a *cy-près* manner.[81]

4. OTHER CLASS ACTION STATUTES AND PROPOSALS

Since the amendment of Rule 23 of the Federal Rules of Civil Procedure in 1966, various jurisdictions have adopted or proposed legislation modelled to a greater or lesser extent upon Rule 23(e): for example, Rule 42(e) of the Texas Rules of Civil Procedure[82] reproduces subdivision (e) of Rule 23

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[76] See, for example, *Grunin v. International House of Pancakes, supra*, note 57; *Sheffield v. Itawamba County Board of Supervisors*, 439 F.2d 35 (5th Cir. 1971); and *City of Detroit v. Grinnell Corp., supra*, note 64. See, also, Newberg, *supra*, note 42, Vol. 3, §5690, at 593.

[77] See, for example, *Zients v. LaMorte*, 459 F.2d 628 (2d Cir. 1972), and *Glicken v. Bradford, supra*, note 73.

[78] See, for example, *Barnes v. Osofsky*, 254 F. Supp. 721 (S.D.N.Y. 1966), at 726, aff'd 373 F.2d 269 (2d Cir. 1967). See, also, Newberg, *supra*, note 42, Vol. 3, §5585, at 484-85.

[79] A late filing claimant still may be permitted to participate in the settlement: see, for example, *Zients v. LaMorte, supra*, note 77, at 630-31.

[80] See, for example, *In re Antibiotic Antitrust Actions, supra*, note 52, discussed in Bartsh, Boddy, King, and Thompson, *supra*, note 55, at 33.

[81] See *supra*, ch. 14, sec. 3(c)(v), where this term is discussed with reference to the distribution of monetary relief pursuant to a class action judgment. In the context of a settlement, see, for example, *State of West Virginia v. Chas. Pfizer & Co., Inc., supra*, note 57, and *Daar v. Yellow Cab Co.*, 67 Cal. 2d 695, 433 P.2d 732 (S.C. 1967).

[82] Tex. R. Civ. P. 42(e).

verbatim. In this section, we shall first make reference to jurisdictions that have adopted or proposed provisions substantially similar to Rule 23(e). Thereafter, we shall consider provisions that, although influenced by Rule 23(e), have made noteworthy departures from its language.

(a) Provisions Substantially Similar to Rule 23(e)

(i) New York and South Australia

Section 908 of the New York Civil Practice Law and Rules [83] is modelled on Rule 23(e) and provides as follows:

> 908. A class action shall not be dismissed, discontinued, or compromised without the approval of the court. Notice of the proposed dismissal, discontinuance, or compromise shall be given to all members of the class in such manner as the court directs.

It should be noted that the New York provision, unlike Rule 23(e), expressly provides for the situation where the class action is dismissed for want of prosecution.[84] This deviation from the Federal Rule was followed as well by the Law Reform Committee of South Australia in its Draft Bill for a Class Actions Act.[85]

However, the New York provision and the Draft Bill of the Law Reform Committee of South Australia deal differently with one important matter. Like Rule 23(e), section 908 of the New York Civil Practice Law and Rules provides that notice "shall be given to all members of the class in such manner as the court directs". Section 8(1) of the South Australia Draft Bill, on the other hand, provides as follows (emphasis added):

> 8.-(1) A class action shall not be discontinued or dismissed or compromised without the approval of the Court and the Court *may order notice of such proposed discontinuance, dismissal or compromise to be given in such manner as the Court directs.*

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[83] N.Y. Civ. Prac. Law §908 (McKinney).

[84] N.Y. Civ. Prac. Law §3217, which governs the discontinuance of an action, appears equivalent to r. 320 of the Supreme Court of Ontario Rules of Practice, while N.Y. Civ. Prac. Law §3216, dealing with the dismissal of an action for want of prosecution, seems comparable to r. 322 of the Ontario Rules of Practice: see, generally, *supra*, notes 6 and 9. It will be recalled that, in the construction of Rule 23(e), the term "dismissal" has been held by some courts not to include a dismissal for want of prosecution because of the involuntary character of this relief: see, generally, *supra*, note 34. See, also, Weinstein, Korn, and Miller, *New York Civil Practice* (1979), Vol. 2, ¶908.01, at 9-131.

[85] Law Reform Committee of South Australia, "Draft Bill for a Class Actions Act", in *Thirty-sixth Report Relating to Class Actions* (1977), at 12, s. 8(1) (hereinafter referred to as "South Australia Draft Bill"). See, also, Williams, "Model Consumer Class Actions Act", in "Consumer Class Actions in Canada – Some Proposals for Reform" (1975), 13 Osgoode Hall L.J. 1, at 65, s. 8 (hereinafter referred to as "Williams' Model Act"), which is identical to the provision recommended by the Law Reform Committee of South Australia. Professor Williams, at 82, notes that "the plaintiff can discontinue the action without leave provided he acts within the time specified by the Rules (Rule 320 in Ontario . . .)" and, therefore, included reference to the discontinuance of a class action within this section of his Model Act.

As will be noted, under this provision the court is not obliged to order notice: the term "may" has been substituted for the word "shall" used in Rule 23(e).

(ii) Canadian Legislation: An Act to Amend the Combines Investigation Act — Bills C-42 and C-13

Both Bills C-42[86] and C-13[87] contain the following provision with respect to the discontinuance and compromise of a class action:

> A class action shall not be discontinued or compromised without the approval of the Court that ordered it to be maintained.

There are two obvious differences between this provision and Rule 23(e). First, the section seems to apply only to class actions that have been ordered "to be maintained". If this is the true construction of the section, it does not apply to class actions that are discontinued or settled prior to certification. A second difference is that, unlike Rule 23(e), the proposed section fails to address the issue of notice. Because the section is silent on this point, it would seem that absent class members need not be notified of a class action settlement, notwithstanding its potentially binding effect.

(b) Provisions Influenced by Rule 23(e)

(i) Quebec

Included in the recently implemented class action provisions of the Quebec *Code of Civil Procedure*[88] are the following articles:

> 1016. The representative cannot amend a proceeding, or discontinue, in whole or in part, the action, a proceeding or a judgment, without the permission of the court and except on the conditions it deems necessary.
>
> 1025. Transaction[89] or acceptance of a tender or of a confession of judgment that is not for the whole of the demand or that is not unconditional, is valid only if approved by the court. This approval cannot be given unless a notice has been given to the members.
>
> The judgment determines, if such is the case, the terms and conditions of application of articles 1029 to 1040.

Like Rule 23(e), article 1025 provides that a settlement of a class action requires both court approval and notice; it would appear that, in the case of a

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[86] *An Act to Amend the Combines Investigation Act*, Bill C-42, 1977 (30th Parl. 2d Sess.), s. 39.19.

[87] *An Act to Amend the Combines Investigation Act*, Bill C-13, 1977 (30th Parl. 3d Sess.), s. 39.17.

[88] *Code of Civil Procedure*, R.S.Q. 1977, c. C-25, arts. 999-1051, as enacted by S.Q. 1978, c. 8, s. 3.

[89] See *Civil Code of Quebec*, art. 1918, where this term is defined as follows:

> 1918. Transaction is a contract by which the parties terminate a law-suit already begun, or prevent future litigation by means of concessions or reservations made by one or both of them.

discontinuance, only court approval is mandatory. However, the court would, no doubt, have a discretion under article 1016, as one of "the conditions it deems necessary", to order notice. Furthermore, it would appear that these sections apply to pre-certification discontinuances and settlements of class actions. Article 1016, for example, refers to the representative discontinuing "the action, [or] a proceeding". With respect to article 1025, the general wording of the provision would seem to suggest that any settlement that is not for the whole of the demand, whether made before or after certification, is subject to the requirement of court approval and notice.

(ii) Illinois

In 1977, Illinois adopted class action legislation that contained the following section dealing with the issue of settlement:[90]

> 57.7 Any action brought as a class action under Section 57.2 shall not be compromised or dismissed except with the approval of the court and, unless excused for good cause shown, upon notice as the court may direct.

Section 57.7 provides that the approval of the court is always required for a settlement or dismissal of a class action. However, this section differs from Rule 23(e) in two significant ways. First, section 57.7 provides that notice to the class may be "excused for good cause shown", whereas Rule 23(e) provides that "notice of the proposed dismissal or compromise shall be given to all members of the class".[91] Secondly, as section 57.7 expressly refers to "[a]ny action brought as a class action", it would seem to apply to pre-certification settlements and dismissals of class actions.[92]

(iii) Uniform Class Actions Act

Section 12 of the American Uniform Class Actions Act[93] addresses the issue of dismissals and settlements of class actions in a manner significantly different from Rule 23(e). Section 12 provides as follows:

> 12.(a) Unless certification has been refused under Section 2, a class action, without the approval of the court after hearing, may not be (1) dismissed voluntarily, (2) dismissed involuntarily without an adjudication on the merits, or (3) compromised.
>
> (b) If the court has certified the action under Section 2, notice of hearing on the proposed dismissal or compromise shall be given to all members of the class in a manner the court directs. If the court has not ruled on certification, notice of hearing on the proposed dismissal or compromise may be ordered by the court which shall specify the persons to be notified and the manner in which notice is to be given.

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[90] Illinois Civil Practice Act, Ill. Ann. Stat. ch. 110, §57.7 (Smith-Hurd 1981 Supp.).

[91] But see *supra*, this ch., sec. 3(a), where the issue of notice in a pre-certification settlement context is discussed.

[92] See Fylstra, *supra*, note 49, at 26-27.

[93] National Conference of Commissioners on Uniform State Laws, Uniform Class Actions Act, Uniform Laws Ann. (1975), Vol. 12 (Cum. Supp. 1981), at 20, §12. For commentary, see Alpert, "The Uniform Class Action Act: Some Promise and Some Problems" (1979), 16 Harv. J. Legis. 583, at 642-43.

(c) Notice given under subsection (b) shall include a full disclosure of the reasons for the dismissal or compromise including, but not limited to, (1) any payments made or to be made in connection with the dismissal or compromise, (2) the anticipated effect of the dismissal or compromise on the class members, (3) any agreement made in connection with the dismissal or compromise, (4) a description and evaluation of alternatives considered by the representative parties and (5) an explanation of any other circumstances giving rise to the proposal. The notice also shall include a description of the procedure available for modification of the dismissal or compromise.

(d) On the hearing of the dismissal or compromise, the court may:

(1) as to the representative parties or a class certified under Section 2, permit dismissal with or without prejudice or approve the compromise;

(2) as to a class not certified, permit dismissal without prejudice;

(3) deny the dismissal;

(4) disapprove the compromise; or

(5) take other appropriate action for the protection of the class and in the interest of justice.

(e) The cost of notice given under subsection (b) shall be paid by the party seeking dismissal, or as agreed in case of a compromise, unless the court after hearing orders otherwise.

Section 12(a) stipulates that, unless certification has been refused, all dismissals or settlements of class actions, both before and after certification, require court approval after a hearing. Section 12(b) sets out the notice requirements with respect to dismissals and settlements of class actions and, unlike Rule 23(e), differentiates between the types of notice required before and after certification. In the former case, notice of a proposed dismissal or compromise is within the discretion of the court. After certification, notice is mandatory. The manner of notifying the class members, however, is left to the court's discretion in both cases. Section 12(c) enumerates items that must be included in the notice to the absent class members, whereas Rule 23(e) contains no such provision. Nor does Rule 23(e) contain provisions similar to either section 12(d), which outlines the ways in which a court can dispose of a settlement or a motion for dismissal of a class action, or section 12(e), which deals with the issue of costs.

(iv) United States Department of Justice, Office for Improvements in the Administration of Justice, Bills S. 3475 and H.R. 5103

Both O.I.A.J. Bills S. 3475[94] and H.R. 5103[95] included similar provisions governing the settlement of class actions. Section 3025 of the latter Bill

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[94] A Bill To provide for the reform of class action litigation procedures, United States Department of Justice, Office for Improvements in the Administration of Justice, Bill S. 3475, 95th Cong., 2d Sess. §3026 (1978).

[95] Small Business Judicial Access Act of 1979, United States Department of Justice, Office for Improvements in the Administration of Justice, Bill H.R. 5103, 96th Cong., 1st Sess. §3025 (1979).

provided as follows:[96]

> 3025(a) Settlement of a public or class compensatory action shall become effective only with the approval of the court after a hearing and upon the entry of a judgment stating the terms of a proposed settlement. The court may require or permit limited discovery on the merits supervised by the court to determine the fairness of a settlement. If a settlement is reached before the making of the determinations required by section 3022(d) [that is, prior to certification], the court shall include in the judgment findings as to the scope of the action, including a description of the transaction giving rise to the action, and the substantial question of law or fact common to all injured or sued persons included within or represented by the action. The proponents of a settlement shall have the burden of demonstrating its fairness to the court.
>
> (b)(1) Except as provided in section 3001(d), in a public action conducted by a relator or a State by reference, notice of a proposed settlement and hearing shall be given to the United States, and the United States may participate in the hearing.
>
> (2) In a class compensatory action, notice of a proposed settlement and hearing shall be given to the members of the class at a time and in a manner found by the court to assure adequacy of representation and fairness.

Section 3025(a) provided that, in the case of either a public or class compensatory action,[97] a settlement would become effective only with the approval of the court and after a hearing at which the proponents of the settlement would have the burden of demonstrating its fairness. In order to determine the fairness of the proposed settlement, the court might "require or permit limited discovery on the merits". Furthermore, it was stipulated that the terms of the approved settlement must be entered as a formal judgment.[98]

Rule 23(e), on the other hand, does not provide any guidance with respect to settlement procedure.[99] Furthermore, unlike Rule 23(e), the O.I.A.J. provisions would have applied expressly to both pre-certification and post-certification settlements, and set out certain matters that a court must include in its judgment where the settlement approved was reached prior to certification. The notice provisions were governed by subsection (b) and stated that notice "shall" be given. In the case of a public action brought by either a relator or a state by reference, notice of the proposed settlement and hearing was required to be given to the Attorney General of the United States; where a class compensatory action was brought, notice to the members of the class was required.

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[96] See, also, legislation under consideration by a committee of the American Bar Association, Section of Litigation, *Proposed Class Action Legislation* (tentative draft, May 1980), §3006, which is similar to the O.I.A.J. Bills.

[97] For a discussion of the nature of public and compensatory actions, see *supra*, ch. 6, sec. 1(a)(iv).

[98] In United States Department of Justice, Office for Improvements in the Administration of Justice, *H.R. 5103 - Bill Commentary: The Case for Comprehensive Revision of Federal Class Damage Procedure* (1979), at 67, there is the following statement: "A recent study of securities actions in the Northern District of Texas shows that many settlements result in no recorded judgment and may be used to leverage an attorney's fee or a recovery for class representatives alone."

[99] See *supra*, this ch., sec. 3(b).

5. CONCLUSIONS

At the beginning of the chapter, we expressed the view that the settlement and discontinuance of class actions is a particularly important issue, and one that should be dealt with in the proposed *Class Actions Act*. As the preceding discussion indicates, there is a real possibility that, without the benefit of appropriate safeguards, parties and their counsel might be tempted to abuse the class action procedure in reaching a settlement. For example, the representative plaintiff might use the class action to enhance his individual bargaining position, or class members' interests could be sacrificed for lawyers' fees. Furthermore, class members who rely upon a class action could be prejudiced if they are not advised of the suit's discontinuance. Moreover, in the context of a settlement negotiated on behalf of the entire class, the agreement reached could be inadequate or unfair to the class members.[100]

Having canvassed the various approaches to the settlement and discontinuance of class actions adopted or proposed in other jurisdictions, we wish to express our opinion as to the way in which the proposed *Class Actions Act* should deal with this matter. We recommend that the proposed Act should provide that any action commenced under the Act should not be settled, discontinued, or dismissed for want of prosecution without the approval of the court and upon such terms and conditions, including notice or otherwise, as the court considers proper.[101]

The first observation that we wish to make is that our recommended provision applies to any action "commenced" under the proposed Act. We have chosen this language to reflect our intention that the provision should unambiguously embrace pre-certification settlements, discontinuances, and dismissals for want of prosecution of class actions,[102] and thereby circumvent problems of interpretation similar to those that have occurred in the United States under Rule 23(e). In reaching this conclusion, we have been influenced by the argument that to restrict the proposed provision to the post-certification stage of the proceedings could result in the parties placing an undue premium on early settlement as a means of avoiding, for example, the requirement of court approval and the possibility of having to notify absent class members. Moreover, a contrary rule might encourage collusion and foster the formulation of "secret settlements" during the period prior to certification.[103]

Secondly, it should be noted that, under our recommendation, any time a settlement, discontinuance, or dismissal for want of prosecution of a class action is contemplated, either before or after certification, court approval would be mandatory. Our recommendation empowers the court, in granting approval, to impose such terms and conditions, including notice or otherwise,

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[100] See *supra*, this ch., sec. 2(a) and (b).

[101] See Draft Bill, s. 36(1).

[102] See Illinois Civil Practice Act, *supra*, note 90, §57.7, where a similar phrase was used to achieve this result.

[103] See *supra*, this ch., sec. 2(a).

as it considers proper. It follows, therefore, that we have rejected a mandatory notice requirement. Under our recommendation, a court could, as a term of granting approval, provide for the giving of notice and the manner by which notice is to be given.[104] Matters of this kind, in our opinion, should be left entirely to the court's discretion, although we anticipate that, as a general rule, a court might well decide to order notice. In this regard, we have adopted the approach of the Law Reform Committee of South Australia,[105] which is also the current trend in certain pre-certification class action settlement cases in the United States.[106]

Under our recommendation, the terms and conditions that may be imposed by a court include, but are not limited to, issues relating to notice. As a term or condition of approving a proposed settlement, discontinuance, or dismissal of a class action, the court, for example, could impose a requirement that the parties submit additional information concerning the action.[107] Where a settlement is proposed prior to certification, it is possible that the parties will not have filed affidavits or conducted examinations thereon.[108] In the case of a post-certification settlement, the parties may not have engaged in pre-trial discovery, and, although the court may have the benefit of the information presented at the certification hearing, such information may not be sufficient to enable the court to determine the fairness of the agreement. Furthermore, as the experience in the United States indicates, there may be occasions where the absent class members will require more detailed information to assist them in evaluating the fairness of a class settlement. The statutory provision that we have recommended is sufficiently broad to enable the court to permit absent class members the right to discover the proponents of the settlement.

One last issue considered by the Commission in the context of class action settlements concerns those instances where a proposed settlement agreement, negotiated on behalf of the class, contains a provision that stipulates that the residue of the settlement fund be distributed in a *cy-près* manner. As in the case of a proposed *cy-près* distribution of monetary relief,[109] we recommend that, before the court makes an order approving a settlement containing as one of its terms provision for the application of undistributed money in a *cy-près* manner, notice should be given to the Attorney General, who should be able to make submissions respecting the propriety of such an order.[110]

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[104] With respect to the costs of a settlement notice, see *supra*, ch. 17, sec. 5(d)(iv), and Draft Bill, s. 36(2).

[105] South Australia Draft Bill, *supra*, note 85, s. 8(1). See, also, Williams' Model Act, *supra*, note 85, s. 8.

[106] See *supra*, this ch., sec. 3(a)(ii).

[107] It was noted earlier that, in the United States under Rule 23(e), before making a determination with respect to the reasonableness of the settlement, a court should be fully apprised of the facts: see *supra*, this ch., sec. 3(b).

[108] See *supra*, ch. 10, sec. 2.

[109] See *supra*, ch. 14, sec. 3(c)(v)g.

[110] See Draft Bill, s. 29.

Recommendations

The Commission makes the following recommendations:

1. Any action commenced under the proposed *Class Actions Act* should not be settled, discontinued, or dismissed for want of prosecution without the approval of the court and upon such terms and conditions, including notice or otherwise, as the court considers proper.

2. Before the court makes an order approving a settlement containing as one of its terms provision for the application of undistributed money in a *cy-près* manner, notice should be given to the Attorney General, who should be able to make submissions respecting the propriety of such an order.

CHAPTER 21

APPEALS AND CLASS ACTIONS

1. INTRODUCTION

The right to appeal is well entrenched in our legal system, and with good reason. However carefully a trial court may consider a point of fact or law, there is always the possibility of error. Appellate courts stand ready to hear, in appropriate cases, allegations of error and, where error is established, to correct decisions of lower courts. Moreover, appellate courts have an essential role to play in the development of sound jurisprudence. Accordingly, it is important not only to preserve the right to appeal, but also to render appeal procedures readily available.

However, while the right to appeal should be nurtured in our judicial system, it should be protected from abuse. The number of appeals in the Province has increased substantially: from 1970 through 1980 the number of cases heard annually by the Court of Appeal increased from approximately 900 to 1,400.[1] This increase in the number of appeals is but one aspect of the steadily increasing pressure that has been placed upon the Ontario judicial system.[2] Particularly in light of this situation, there is no reason to encourage appeals that are launched only out of desperation; the right to appeal should not be converted into a tactical weapon to be used by litigants purely for the purpose of harassment.

In addressing the issue of appeals in class actions, the Commission has been mindful of these considerations. The revised class action procedure that we have recommended raises novel issues relating to appeals, including the stages of the class action procedure at which a formal appeal procedure

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[1] See Province of Ontario, *Annual Report of the Inspector of Legal Offices, Province of Ontario, 1970* (1971), at 13, and Province of Ontario, Ministry of the Attorney General, *Court Statistics Annual Report, Fiscal Year 1979/1980*, at 2-5. In response to this problem, the Attorney General appointed a special committee in the fall of 1975 to "examine the present, and explore the future needs in Ontario with respect to the present appellate jurisdiction and function of the Supreme Court of Ontario . . . ": see Province of Ontario, Ministry of the Attorney General, *Report on the Attorney General's Committee on the Appellate Jurisdiction of the Supreme Court of Ontario* (1977), at v. On March 10, 1977, the Committee submitted its Report, which recommended several modifications to the organization and structure of Ontario courts and to the appellate process.

[2] See Howland, "Reports on The Administration of Justice in Ontario on the Opening of The Courts For 1981" (1981), 15 L.S.U.C. Gazette 26, at 26-36.

should be permitted, whether appeals should be available as of right or with leave, and whether absent class members should be permitted to initiate appeals. In dealing with these issues, we shall first consider the appeal of certification orders. Thereafter, we shall discuss the appeal of the final judgment on the common questions and the appeal of the determination of individual issues. Finally, we shall canvass the appeal issues that arise out of *cy-près* and forfeit distributions.

2. THE APPEAL OF CERTIFICATION ORDERS

In this section, we shall consider whether the parties to a class action should be able to appeal an order granting or denying certification or decertifying a class action. We shall also consider whether, if there is a right of appeal, it should be available to an absent class member. Before we state our recommendations on these important issues, a short sketch of the present law in Ontario and in the United States, and the way in which these issues have been dealt with in other class action statutes and proposals, would seem to be appropriate.

(a) The Present Law in Ontario

An order granting or denying certification is, of course, at present unknown in Ontario. In this Province, orders that may be granted by a court are either "final" or "interlocutory" in nature. Each classification carries with it important distinctions. For example, if an order of the High Court of Justice is held to be final, it may be appealed as of right to the Court of Appeal.[3] If, however, the order is considered to be interlocutory, the appeal is to the Divisional Court, and leave to appeal must first be granted upon application to another High Court judge.[4] In order to obtain leave, the appellant must satisfy the criteria set out in Rule 499(3) of the Supreme Court of Ontario Rules of Practice.[5]

It would appear that there are two policy considerations behind the requirement of leave to appeal in the case of interlocutory orders. First, an unlimited right to appeal from every order of a court would place a particularly onerous burden upon appellate court resources. Secondly, an absolute right of appeal in interlocutory proceedings presents parties with the opportunity to use the expense and delay of appeal proceedings to harass an opposing litigant.[6] In light of these potential problems, most jurisdictions,

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[3] *Judicature Act*, R.S.O. 1980, c. 223, s. 28(1)(*a*). See, also, Province of Ontario, Ministry of the Attorney General, Civil Procedure Revision Committee, untitled report (June 1980), Proposed Revision of The Judicature Act, s. 15 (hereinafter referred to as "Williston Committee Revised Judicature Act").

[4] *Judicature Act, supra*, note 3, s. 17(*b*), and Supreme Court of Ontario Rules of Practice, R.R.O. 1980, Reg. 540, r. 499(1). See, also, Williston Committee Revised Judicature Act, *supra*, note 3, s. 18(1)(c).

[5] *Supra*, note 4. See, also, Province of Ontario, Ministry of the Attorney General, Civil Procedure Revision Committee, untitled report (June 1980), Proposed Rules of Civil Procedure, r. 63.03(3) (hereinafter referred to as "Williston Committee Rules"), which is almost identical to the present r. 499(3) of the Rules of Practice.

[6] Watson and Williams, *Canadian Civil Procedure* (2d ed., 1977), at 6-36 - 6-37.

including Ontario, have restricted the right to appeal from interlocutory orders.

While the rationale underlying this restriction is clear, the Ontario courts repeatedly have encountered difficulty in deciding which orders are to be classified as interlocutory. In *Hendrickson v. Kallio*, Middleton J.A., who delivered the judgment of the Court of Appeal, stated the classic test in this way:[7]

> The interlocutory order from which there is no appeal [without leave] is an order which does not determine the real matter in dispute between the parties – the very subject matter of the litigation, but only some matter collateral. It may be final in the sense that it determines the very question raised by the application, but it is interlocutory if the merits of the case remain to be determined.

However, the guidelines utilized by the courts lack consistency. Subsequent cases, it would appear, have expanded the *Hendrickson* formula.[8] Indeed, in *Delaney Boat Lines and Services Ltd. v. City of Barrie*,[9] Arnup J.A., delivering the judgment of the Ontario Court of Appeal, commented upon the "difficult question" of how one determines whether a particular order is final or interlocutory and, after citing the above passage from *Hendrickson*, commented as follows:[10]

> The application of this passage to the facts of particular cases has been found to be difficult over the years, and one is tempted to follow the advice of Lord Denning, M.R., in *Salter Rex & Co. v. Ghosh*, [1971] 2 Q.B. 597 at p. 601, where the Master of the Rolls said:
>
> > This question of "final" or "interlocutory" is so uncertain that the only thing for practitioners to do is to look up the practice books and see what has been decided on the point. Most orders have now been the subject of decision. If a new case should arise, we must do the best we can with it. There is no other way.

Against this background, it is unclear whether an order granting or denying certification or decertifying a class action would be classified as an interlocutory order or a final order. Accordingly, we are of the view that the question whether there should be a right to appeal such an order should be addressed in the proposed *Class Actions Act*.

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[7] [1932] O.R. 675, at 678, [1932] 4 D.L.R. 580 (C.A.).

[8] See, for example, *Frederick v. Aviation & General Insurance Co. Ltd.*, [1966] 2 O.R. 356 (C.A.); *Binkley v. Matera*, [1973] 1 O.R. 386 (C.A.); *Delaney Boat Lines and Services Ltd. v. City of Barrie* (1976), 15 O.R. (2d) 675 (C.A.); *Re Pearl & Russell Ltd. and Vanbots Construction Ltd. & Co.* (1977), 15 O.R. (2d) 265 (C.A.); *Frischke v. Royal Bank of Canada* (1977), 17 O.R. (2d) 388, 80 D.L.R. (3d) 393 (C.A.); *Smerchanski v. Lewis* (1980), 30 O.R. (2d) 370 (C.A.); *Khalil v. United Investment Services Ltd.* (1975), 11 O.R. (2d) 707 (Div. Ct.); *Meadow Woode Corporation Ltd. v. Eurasia Realty Investments Ltd.* (1976), 1 C.P.C. 62 (Ont. Div. Ct.); *Bryson v. Kerr* (1976), 2 C.P.C. 46 (Ont. Div. Ct.); *Genier v. Commercial Credit Corp. Ltd.* (1975), 11 O.R. (2d) 493 (H.C.J.); and *Denton v. Jones* (1976), 13 O.R. (2d) 419, 73 D.L.R. (3d) 636 (H.C.J.).

[9] *Delaney Boat Lines and Services Ltd. v. City of Barrie, supra*, note 8.

[10] *Ibid.*, at 676.

(b) The Present Law in the United States

(i) The Final Judgment Rule

In the United States federal court system, under the "final judgment rule", an appeal may be taken only from a "final" order.[11] Certification orders, however, have been classified as interlocutory orders and, accordingly, are generally not immediately appealable.[12] However, where certification is denied and the representative plaintiff continues the suit on an individual basis and obtains a final judgment, he may then obtain review of the certification order. Similarly, where certification is granted, the defendant may appeal the order after the final judgment on the common questions has been given.[13]

Notwithstanding the labelling of certification orders as interlocutory, there are statutory and judicially created exceptions to the final judgment rule. We now turn to canvass briefly the most frequently relied upon exceptions.[14]

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[11] 28 U.S.C. §1291 provides as follows:

> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

[12] With respect to the nature of certification orders denying class status, the Court, in *Williams v. Mumford*, 511 F.2d 363 (D.C. Cir. 1975), at 366, *cert.* denied 423 U.S. 828, stated as follows (footnotes omitted):

> [A]n order refusing to certify a class action is generally not a final decision within the meaning of section 1291. It does not dispose of litigation. It is purely procedural in nature, in that it determines merely the parties to the action without expressing any judgment as to the merits of the case.

Similarly, subject to the exceptions mentioned in the text, an order granting certification is not subject to immediate appeal. This issue was discussed by the Second Circuit Court of Appeals in *Parkinson v. April Industries, Inc.*, 520 F.2d 650 (2d Cir. 1975), at 653, as follows:

> The granting of a class designation is in no sense an effective termination of any aspect whatever of the litigation, but only directs the form in which the action will proceed. The initial order is strictly provisional and by the terms of Rule 23(c)(1) 'may be altered or amended before the decision on the merits.' An order granted prior to discovery may be reevaluated on the basis of facts emerging from a fuller record, and a decision by an appellate court upon an appeal from the initial order would not settle the propriety of the designation once and for all because new information might well require a revision of the original order by the district court. The possible likelihood of successive appeals on the same issue, a concern which lies at the heart of the final judgment rules, exists.

[13] *Gosa v. Securities Investment Co.*, 449 F.2d 1330 (5th Cir. 1971).

[14] However, as a result of two recent United States Supreme Court decisions, a number of these exceptions no longer apply: see *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978), discussed *infra*, this ch., sec. 2(b)(ii)b.(2), and *Gardner v. Westinghouse Broadcasting Co.*, 437 U.S. 478 (1978), discussed *infra*, this ch., sec. 2(b)(ii)a.(1).

(ii) Exceptions to the Final Judgment Rule

a. Statutory Exceptions

(1) *The Interlocutory Appeals Act*

Under the final judgment rule, no provision is made for the prompt review of non-final orders, even where delay would cause serious, perhaps irreparable, harm to the rights of the parties. The Interlocutory Appeals Act[15] was enacted to remedy this perceived flaw in the final judgment rule. Without embarking upon a detailed review of this Act, we wish to mention two features that relate to class actions.

First, under section 1292(a)(1)[16] of the Act, it is provided that interlocutory orders of a district court respecting injunctive relief are immediately appealable. In a number of class actions seeking injunctive relief, this section was relied upon to obtain an immediate appeal of a negative class determination.[17] In 1978, however, the United States Supreme Court held in *Gardner v. Westinghouse Broadcasting Co.*[18] that a denial of class certification was not appealable pursuant to section 1292(a)(1).

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[15] 28 U.S.C. §1292. In addition to the Interlocutory Appeals Act, class action commentators have suggested other statutory means of obtaining immediate appeal of certification orders; for example, by procuring a writ of mandamus (see Moore, *Federal Practice* (2d ed., 1980), Vol. 3B, ¶23.97, at 23-607), or by proceeding under Fed. R. Civ. P. 54(b) (see Note, "Appealability of Class Action Determinations" (1975), 44 Fordham L. Rev. 548, at 571-74).

[16] Section 1292(a)(1) of the Interlocutory Appeals Act, *supra*, note 15, provides as follows:

> 1292(a) The courts of appeals shall have jurisdiction of appeals from:
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> (1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court.

[17] See, for example, *Johnson v. Nekoosa-Edwards Paper Co.*, 558 F.2d 841 (8th Cir. 1977), *cert.* denied 434 U.S. 920 (1977); *Brunson v. Board of Trustees of School District No. 1 of Clarendon County*, 30 F.R.D. 369 (E.D.S.C. 1962), rev'd 311 F.2d 107 (4th Cir. 1962), *cert.* denied 373 U.S. 933 (1963); *Jones v. Diamond*, 519 F.2d 1090 (5th Cir. 1975); *Price v. Lucky Stores, Inc.*, 501 F.2d 1177 (9th Cir. 1974); and *Yaffe v. Powers*, 454 F.2d 1362 (1st Cir. 1972). But see *Williams v. Mumford, supra*, note 12; *New York Ass'n of Homes for Aging v. Toia*, 559 F.2d 876 (2d Cir. 1977); *Weit v. Continental Illinois Nat'l Bank & Trust Co. of Chicago*, 535 F.2d 1010 (7th Cir. 1976); and *Donaldson v. The Pillsbury Co.*, 529 F.2d 979 (8th Cir. 1976).

[18] *Supra*, note 14. *Gardner* was a civil rights action initiated by the representative plaintiff on behalf of herself and all other women similarly situated, alleging that the employment practices of Westinghouse Co. discriminated on the basis of sex. The relief sought was injunctive. Certification was denied and the representative plaintiff, relying upon §1292(a)(1) of the Interlocutory Appeals Act, filed for immediate appeal of this order. The Court of Appeals for the Third Circuit, however, refused to recognize this section of the U.S. Code as an appropriate basis for appealing certification orders, despite the substantial body of authority from other circuits permitting such a practice. *Certiorari* was then granted by the U.S. Supreme Court. The Supreme Court supported the decision of the Court of Appeals for the Third Circuit. It held that the class determination was not immediately appealable because it did not have an irreparable effect on the rights of the litigants; the Court noted that full injunctive relief on behalf of the class

The second feature of the Interlocutory Appeals Act that we wish to note is section 1292(b). This provision also has been relied upon to seek immediate appeal of a certification order, a procedure that has been approved recently by the United States Supreme Court.[19] This section provides that, when a district court judge, "in making in a civil action an order not otherwise appealable under [section 1292], shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order". In this event, the section confers upon the Court of Appeals a discretion to permit an appeal to be taken from such order.

b. Judicial Exceptions

In addition to statutory exceptions, appellate courts have developed a number of exceptions, some of which should be briefly mentioned.

(1) *The Death Knell Doctrine*

In 1848, the Supreme Court of the United States, in *Forgay v. Conrad*,[20] held that, where an order subjected a party to "irreparable injury", it was final for the purposes of review.[21] A more significant exception to the final judgment rule was recognized in *Cohen v. Beneficial Industrial Loan Corp.*,[22]

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still could be sought on appeal after a trial on the merits. Section 1292(a)(1), the Court stated at 480, was intended only as a limited exception to the final judgment rule to " 'permit litigants to effectually challenge interlocutory orders of serious, perhaps irreparable, consequence' ". Accordingly, the Court concluded that it would be unwarranted to include certification orders within the purview of this section.

[19] *Coopers & Lybrand v. Livesay, supra*, note 14. Nonetheless, its true usefulness has been doubted by various class action commentators: see, for example, Note, "Immediate Appealability of Orders Denying Class Certification: *Coopers & Lybrand v. Livesay* and *Gardner v. Westinghouse Broadcasting Co.*" (1979), 40 Ohio S. L.J. 441, at 467, and Note, "A Final Tolling of the Death-Knell: The Doctrine, Its Demise and Current Alternative Methods of Appeal of Class Certification Orders" (1978-79), 28 Drake L. Rev. 668 (hereinafter referred to as "A Final Tolling of the Death-Knell"). Prior to this decision of the Supreme Court, there was a lack of consistency among the authorities. Compare, for example, *Susman v. Lincoln American Corp.*, 561 F.2d 86 (7th Cir. 1977); *Lukenas v. Bryce's Mountain Resort, Inc.*, 538 F.2d 594 (4th Cir. 1976); *Wilcox v. Commerce Bank of Kansas City*, 474 F.2d 336 (10th Cir. 1973); and *Fisons Ltd. v. United States*, 458 F.2d 1241 (7th Cir. 1972), where appeals of certification orders pursuant to §1292(b) were permitted, with *Donaldson v. The Pillsbury Co., supra*, note 17, and *In re Master Key Antitrust Litigation*, 528 F.2d 5 (2d Cir. 1975), where they were not.

[20] 47 U.S. 200 (1848).

[21] The *Forgay* rationale subsequently was distilled to apply in cases where the order for which review was sought carried "serious public consequences": see, for example, *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120 (1945), at 124.

[22] 337 U.S. 541 (1949), at 546, where Jackson J., who delivered the opinion of the Court, commented as follows:

> This decision appears to fall in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated. The Court has long given this provision [§1291] . . . this practical rather than a technical construction.

where the Supreme Court held that an order would be immediately appealable if it was "collateral" to the merits of the suit, imposed irreparable injury, and was not tentative, informal, incomplete, or inconclusive.

Relying on these exceptions to the final judgment rule, namely the "irreparable harm" and "collateral order" doctrines, the Second Circuit Court of Appeals, in a series of cases, developed a third exception applicable to class actions that became known as the "death knell" doctrine. This doctrine provided generally that, where the representative plaintiff's claim would not be large enough to warrant individual prosecution, taking into consideration litigation costs, the size of the potential judgment, and the complexity of the litigation, an order denying certification should be regarded as "final" and, consequently, subject to immediate appeal.[23]

This doctrine was first advanced in *Eisen v. Carlisle & Jacquelin.*[24] It will be recalled that, in this case, the plaintiff filed a class action on behalf of himself and all other similarly situated purchasers and sellers of "odd-lots" on the New York Stock Exchange against certain brokers, alleging that they had conspired to monopolize odd-lot trading and to charge excessive fees in violation of antitrust legislation. The District Court denied certification, leaving Mr. Eisen facing the prospect of prosecuting a $70 claim. The Second Circuit Court of Appeals, however, granted immediate appeal of the order refusing certification after concluding that, if review were not granted, the death knell of the action would be sounded. The Court stated as follows:[25]

> The alternatives are to appeal now or to end the lawsuit for all practical purposes. Judge Tyler's order 'if unreviewed, will put an end to the action'. We can safely assume that no lawyer of competence is going to undertake the complex and costly case to recover $70 for Mr. Eisen. If the appeal is dismissed, not only will Eisen's claims never be adjudicated, but no appellate court will be given the chance to decide if this class action was proper under the newly amended Rule 23.

Subsequent to *Eisen*, because of the large number of appeals filed from certification orders, the Second Circuit Court of Appeals further clarified the

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[23] One of the shortcomings of the death knell doctrine, commented upon frequently during the early years of its development, was that it applied only to orders denying certification. It was not until 1974 that the Court of Appeals for the Second Circuit confronted this issue in the case of *Herbst v. International Telephone and Telegraph Corp.*, 495 F.2d 1308 (2d Cir. 1974), by devising what came to be known as the "reverse" death knell doctrine. In this case, the defendant sought to appeal an order granting certification of a class suit seeking close to $100 million in damages. Relying primarily on *Cohen v. Beneficial Industrial Loan Corp., supra*, note 22, the Second Circuit Court of Appeals assumed jurisdiction over the appeal after requiring the defendant to satisfy the following three prerequisites (at 1312-13): first, that the order was fundamental to the further conduct of the case; secondly, that a review of the order did not require an examination into the merits of the action; and thirdly, that the defendant would suffer irreparable harm if review were delayed until after a final determination of the case. And see *Kohn v. Royall, Koegel & Wells*, 496 F.2d 1094 (2d Cir. 1974), where these criteria were discussed in greater detail. As in the case of the death knell doctrine, the reverse death knell doctrine was not accepted by every circuit court: see A Final Tolling of the Death-Knell, *supra*, note 19, at 681.

[24] 370 F.2d 119 (2d Cir. 1966).

[25] *Ibid.*, at 120 (footnotes omitted).

doctrine and established guidelines for its use. For example, in *Korn v. Franchard Corp.*,[26] the Court held that, if the representative plaintiff's claim approached $10,000, the denial of class action certification would not be immediately appealable, the rationale being that, in such a case, the plaintiff would have sufficient incentive to continue the litigation on an individual basis.[27] Furthermore, the Court indicated that it would consider the complexity of the issues in determining whether an individual plaintiff could reasonably be expected to continue on his own.[28]

While the death knell doctrine eventually was accepted by a number of circuit courts,[29] it was specifically rejected by the Third and Seventh Circuits.[30] This conflict between the circuit courts, however, was resolved by the United States Supreme Court in *Coopers & Lybrand v. Livesay.*[31]

(2) *Coopers & Lybrand v. Livesay: The Demise of the Death Knell Doctrine*

The plaintiffs in *Coopers & Lybrand* sought to represent a class of 1,800 purchasers who, like themselves, claimed to have relied upon deceptive financial statements in purchasing securities from a Florida land development corporation. The defendant was the accounting firm of Coopers & Lybrand, which had certified the allegedly misleading financial statements. The representative plaintiffs' total claim for damages was approximately $2,600.

The District Court initially certified the action and then, because of a delay in its prosecution, decertified the suit on the basis of inadequacy of representation. Relying on the death knell doctrine, the plaintiffs appealed to the Eighth Circuit Court of Appeals, which recertified the class action. The defendants then petitioned for and were granted a writ of *certiorari* to the Supreme Court of the United States.

The Supreme Court unanimously reversed the Court of Appeals for the Eighth Circuit, holding that the death knell doctrine would not support federal appellate jurisdiction of certification orders because of their non-final character. Stevens J., who delivered the opinion of the Court, cited *Catlin v.*

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[26] 443 F.2d 1301 (2d Cir. 1971).

[27] This financial guideline did not escape criticism: see, for example, *Shayne v. Madison Square Garden Corp.*, 491 F.2d 397 (2d Cir. 1974), at 400.

[28] *Korn v. Franchard Corp., supra*, note 26, at 1307.

[29] See, for example, *Williams v. Mumford, supra*, note 12; *Graci v. United States*, 472 F.2d 124 (5th Cir. 1973), *cert.* denied 412 U.S. 928 (1973); *Ott v. Speedwriting Publishing Co.*, 518 F.2d 1143 (6th Cir. 1975); *Hartmann v. Scott*, 488 F.2d 1215 (8th Cir. 1973); and *Falk v. Dempsey-Tegeler & Co. Inc.*, 472 F.2d 142 (9th Cir. 1972).

[30] See, for example, *Hackett v. General Host Corp.*, 455 F.2d 618 (3d Cir. 1972), *cert.* denied 407 U.S. 925 (1972); *Samuel v. University of Pittsburgh*, 506 F.2d 355 (3d Cir. 1974); and *King v. Kansas City Southern Industries, Inc.*, 479 F.2d 1259 (7th Cir. 1973).

[31] *Coopers & Lybrand v. Livesay, supra*, note 14.

United States,[32] and noted that "[f]ederal appellate jurisdiction generally depends on the existence of a decision by the District Court that 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment' ".[33] Stevens J. went on to hold that "[a]n order refusing to certify, or decertifying, a class does not of its own force terminate the entire litigation because the plaintiff is free to proceed on his individual claim" and that "[s]uch an order is appealable . . . only if it comes within an appropriate exception to the final-judgment rule".[34] In the final analysis, Stevens J. decided that neither the "collateral order" doctrine[35] espoused in *Cohen v. Beneficial Industrial Loan Corp.*[36] nor the death knell doctrine, the two exceptions upon which the respondents had relied, provided such an exception.

With respect to the death knell doctrine, Stevens J. stressed the important policies underlying the final judgment rule and stated that, in his opinion, the death knell doctrine, unlike established statutory exceptions to this rule, contravened these policies.[37] For example, Stevens J. commented that, by definition, the death knell doctrine permitted "piecemeal" review – several appeals from different rulings in the same case – and noted that it was precisely this type of inefficiency that the final judgment rule had been designed to avoid.[38] Furthermore, Stevens J. suggested that the doctrine, by providing for indiscriminate interlocutory appellate review, undermined the relationship between the district and appellate courts.[39] The need to maintain this relationship, he explained, was the reason Congress had required the consent of first the district court and then the appellate court for a section 1292(b) interlocutory appeal.[40]

In addition, the Court held the application of the doctrine to be arbitrary when based solely on the quantum of the representative plaintiff's claim and too burdensome for the courts to administer when other criteria were taken into consideration.[41] Furthermore, Stevens J. noted that the creation of any such guidelines necessitated legislative approval and, accordingly, that the

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[32] 324 U.S. 229 (1945), at 233.

[33] *Supra*, note 14, at 467.

[34] *Ibid.*

[35] See *ibid.*, at 468-69, where Stevens J. stated that class certification orders were not within the ambit of the collateral order doctrine for the following three reasons: first, under Rule 23(c)(1) a certification order is subject to amendment at any time before final judgment; secondly, the determinations involved in class certification are enmeshed in factual and legal aspects of the representative plaintiff's cause of action; and thirdly, the order could be reviewed effectively after a decision on the merits.

[36] *Supra*, note 22.

[37] *Coopers & Lybrand v. Livesay, supra*, note 14, at 471.

[38] *Ibid.*, at 474.

[39] *Ibid.*, at 476.

[40] *Ibid.*, at 474-75.

[41] *Ibid.*, at 472-73.

circuit courts, in devising this doctrine, had overstepped their jurisdiction.[42] Moreover, Stevens J. asserted that there was no need for such a judicially created exception to the final judgment rule, because adequate review of certification orders could be obtained pursuant to section 1292(b) of the United States Code.[43]

(iii) Summary

As a result of the recent United States Supreme Court decisions in *Coopers & Lybrand v. Livesay*[44] and *Gardner v. Westinghouse Broadcasting Co.*,[45] the right to appeal orders granting and denying certification has been curtailed severely. A defendant who seeks to appeal an order granting certification, if he does not wish to wait until after the final judgment on the common questions has been rendered, must meet the criteria with respect to an immediate right of appeal set out in section 1292(b) of the Interlocutory Appeals Act. Similarly, there are few courses of action available to a class representative who wishes to appeal a denial of certification: he too may attempt to seek interlocutory review by way of a discretionary appeal pursuant to section 1292(b); he may continue his individual claim with the intention of appealing the certification order upon entry of final judgment;[46] or he may abandon the class action and possibly his individual claim as well. Given the practical difficulties of discretionary review, and the obvious futility of the last alternative, a representative plaintiff is left with the primary option of pursuing his own claim and subsequently appealing the certification order after final judgment has been rendered. However, there are a number of problems with this procedure.

First, if, following judgment on his individual claim, the representative plaintiff were to appeal the negative class finding and the appellate court were to hold that the class should have been certified, the original error could not be cured simply by entering judgment for the class. Rather, a second trial on the merits would be required.[47] A further problem that emerges is the possibility that such an appeal never will be pursued. For example, the trial on the merits may have shown a losing plaintiff that his own claim is not likely to be successful on appeal or in a new trial; accordingly, he may decide to abandon the case and not appeal the order denying certification. Yet his loss may have been occasioned by a particular infirmity in his own claim that is not shared by the claims of the other class members. Similarly, when an individual plaintiff has been successful at trial, he may have no further

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[42] *Ibid.*, at 472.

[43] *Ibid.*, at 474.

[44] *Supra*, note 14.

[45] *Supra*, note 14.

[46] See, for example, *Deposit Guaranty National Bank, Jackson, Mississippi v. Roper*, 100 S. Ct. 1166 (1980).

[47] See Cohen, " 'Not Dead But Only Sleeping': The Rejection of the Death Knell Doctrine and the Survival of Class Actions Denied Certification" (1979), 59 B.U. L. Rev. 257.

interest in the appeal of the class decision, although, in this event, a putative class member may intervene to appeal the denial of class certification.[48]

(c) Other Class Action Statutes and Proposals

In the United States, two proposed class action statutes deal expressly with the appeal of an order granting or denying certification. First, each of Bills S. 3475[49] and H.R. 5103[50] proposed by the Office for Improvements in the Administration of Justice of the United States Department of Justice addressed this issue; each contained similar provisions[51] amending the Interlocutory Appeals Act by adding to section 1292 thereof the following subsection:[52]

> 1292(c) The courts of appeals shall have jurisdiction to review in their discretion orders of the district courts dismissing or allowing actions to be maintained as public actions or class compensatory actions . . . . A person seeking review shall file a petition for leave to appeal with the court of appeals within twenty days of the entry of the order dismissing or allowing an action as a public action or a class compensatory action.

This proposed section, therefore, would have created a separate avenue of appeal from an order dismissing or allowing an action to be maintained as a class action. However, appeal would not have been as of right, but rather would have been a matter for the discretion of the court of appeals. It may be noted that the proposal failed to provide any guidance as to the exercise of this discretion.

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[48] This was the situation, for example, in *United Airlines, Inc. v. McDonald*, 432 U.S. 385 (1977). In that case, class action status was denied and leave to bring discretionary interlocutory appeal of this denial pursuant to 28 U.S.C. §1292(b), although granted by the District Court, was refused by the Seventh Circuit Court of Appeals. Accordingly, the litigation proceeded as a joint suit, and eventually was settled. After entry of the final judgment order, McDonald, a putative class member, having learned of the plaintiff's decision not to appeal the District Court's prior order refusing certification, filed a motion to intervene for the limited purpose of appealing the denial of class status. The District Court denied the motion to intervene on the ground that McDonald's motion was statutorily barred. The Court of Appeals, however, reversed this finding. United Airlines then appealed to the Supreme Court. The Supreme Court held that the suspension of the statutory limitation period upon the filing of a purported class action continued even after class action status had been denied for the limited purpose of appealing that order. Furthermore, the Court commented that it was permissible for a putative class member to intervene in order to appeal the initial denial of class certification where the representative plaintiff had failed to do so.

[49] A Bill To provide for the reform of class action litigation procedures, United States Department of Justice, Office for Improvements in the Administration of Justice, Bill S. 3475, 95th Cong., 2d Sess. (1978) (hereinafter referred to as "O.I.A.J. Bill S. 3475").

[50] Small Business Judicial Access Act of 1979, United States Department of Justice, Office for Improvements in the Administration of Justice, Bill H.R. 5103, 96th Cong., 1st Sess. (1979) (hereinafter referred to as "O.I.A.J. Bill H.R. 5103").

[51] See O.I.A.J. Bill H.R. 5103, *ibid.*, §104, and O.I.A.J. Bill S. 3475, *supra*, note 49, §4.

[52] See, also, draft legislation under consideration by a committee of the American Bar Association, Section of Litigation, *Proposed Class Action Legislation* (tentative draft, May 1980), §103, which proposes a similar amendment to the Interlocutory Appeals Act, *supra*, note 15.

Secondly, section 4(c) of the Uniform Class Actions Act[53] provides that an "order certifying or refusing to certify an action as a class action is appealable". In contrast to the position under Bills S. 3475 and H.R. 5103, section 4(c) appears to permit an appeal as of right. Moreover, although, unlike Bills S. 3475 and H.R. 5103, section 4(c) contains no express provision with respect to the time within which an appeal may be instituted, it would appear that, like these Bills, the provision confers an immediate right of appeal, thereby eliminating the need to wait until the final judgment in the action has been rendered before seeking review.[54] It should also be noted that section 5(d) of the Uniform Class Actions Act provides that an order amending the certification order is appealable.

Developments of interest have also occurred in Canada. Included within the recently implemented class action provisions of the Quebec *Code of Civil Procedure*[55] is the following article:

> 1010. The judgment on the motion is subject to appeal by the applicant or the respondent or, by leave of a judge of the Court of Appeal, by a member of the group on behalf of which the motion had been presented.
>
> The appeal is heard and decided by preference.

The motion referred to in article 1010 is the motion that is brought for authorization to institute the class action.

Both Bill C-42[56] and Bill C-13[57] also dealt with this issue. Each Bill contained the same section, which provided as follows:

> 39.12.-(8) For the purpose of an appeal, an order of a Court that proceedings be maintained as a class action or a refusal to make such an order is a final judgment of the Court.

It will be noted that under this section, as in the Quebec legislation, both an order that proceedings be maintained as a class action and a refusal to make such an order were, for the purposes of an appeal, final judgments of the court and, accordingly, appealable as of right.

Professor Williams, as well, considered the issue of the appeal of certification orders and included the following section in his proposed Model Consumer Class Actions Act:[58]

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[53] National Conference of Commissioners on Uniform State Laws, Uniform Class Actions Act, Uniform Laws Ann. (1975), Vol. 12 (Cum. Supp. 1981), at 20.

[54] See Alpert, "The Uniform Class Actions Act: Some Promise and Some Problems" (1979), 16 Harv. J. Legis. 583. See, also, Forde, "Class Actions in Illinois: Toward a More Attractive Forum for this Essential Remedy" (1977), 26 DePaul L. Rev. 211.

[55] *Code of Civil Procedure*, R.S.Q. 1977, c. C-25, arts. 999-1051, as enacted by S.Q. 1978, c. 8, s. 3 (hereinafter referred to as "C.C.P.").

[56] *An Act to Amend the Combines Investigation Act*, Bill C-42, 1977 (30th Parl. 2d Sess.), s. 39.12(8).

[57] *An Act to Amend the Combines Investigation Act*, Bill C-13, 1977 (30th Parl. 3d Sess.), s. 39.12(8).

[58] Williams, "Model Consumer Class Actions Act", in "Consumer Class Actions in Canada – Some Proposals for Reform" (1975), 13 Osgoode Hall L.J. 1, at 65.

12. For the purpose of any statute or rule of law or practice which regulates appeals in the court

(1) an order that the action is to be maintained as a class action shall be deemed to be an interlocutory order of the court;

(2) an order that an action is not to be maintained as a class action . . . shall be deemed to be a final order of the court.

As will be observed, unlike the provisions previously considered, this proposal draws a distinction between an order that an action is to be maintained as a class action and an order that an action is not to be so maintained. An order of the former type is deemed to be an interlocutory order and, therefore, appealable only with leave; an order that an action is not to be maintained as a class action is deemed to be a final order, appealable as of right.

(d) Recommendations

Having canvassed the ways in which the issue of class action certification appeals has been resolved in different class action statutes and proposals, we wish to make certain recommendations.

As noted in an earlier section of this chapter,[59] should our proposed *Class Actions Act* be enacted, it is uncertain how orders granting or denying certification would be classified. Accordingly, we recommend that the proposed *Class Actions Act* should provide that there should be an appeal as of right from an order certifying or refusing to certify an action as a class action and from an order decertifying a class action.[60] It should be noted that our recommendation would apply to both an order refusing to certify an action and an order decertifying a class action; we see no reason in principle to treat these two situations differently.

Under our recommendation, both the representative plaintiff and the defendant would have a right to appeal the certification decision. It is our belief that, while an order refusing certification could have serious implications for the claims of putative class members, an order granting certification could have equally serious consequences as far as the class defendant is concerned. Accordingly, we are of the view that the parties should be treated similarly. Moreover, because of the potentially serious consequences of an order granting or denying certification, we have recommended an absolute, rather than a discretionary, right of appeal. We have also considered whether an appeal should be to the Court of Appeal or to the Divisional Court. While we are aware of the heavy caseload of each court, we consider it appropriate that the appeal should be to the Divisional Court, and we so recommend.[61]

The Commission has further thought it necessary to deal in the proposed *Class Actions Act* with the possibility that a certification order might be

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[59] *Supra*, this ch., sec. 2(a).

[60] See Draft Bill, s. 37(1).

[61] *Ibid.*

amended. For example, a court could decide to redefine the class membership as originally set out in the certification order, thereby excluding certain class members from the action or, perhaps, including others. In the former instance, the class members excluded from the class litigation might wish to appeal this determination and, in the latter, the defendant, now facing a potentially increased liability, might wish to challenge the amendment to the certification order. Furthermore, as the proceedings progress, an order might be made amending the certification order by varying the original definition of the common questions. The Commission recommends, therefore, that an appeal by any party should lie to the Divisional Court from an order amending an order certifying an action as a class action.[62] We do not believe, however, that an amending order should be appealable as of right because, unlike the original certification order, its importance *vis-à-vis* the rights of the parties or the absent class members will vary. For example, the order could involve a relatively trivial matter, such as an amendment to include an additional representative plaintiff, or it could concern a more important matter, such as a redefinition of the class. Accordingly, we recommend that such an order should be appealable only with leave of a High Court judge.[63]

The Commission further recommends that, if the representative plaintiff does not appeal the certification order or an order amending the certification order or decertifying the class action, or if his appeal is abandoned, any member of the class should be able to apply to a judge of the High Court for leave to appeal on behalf of the class.[64] It will be recalled that this practice is permitted in the United States federal courts, where an absent class member can seek leave to intervene in a class action for the purpose of appealing a negative certification order if the representative plaintiff has failed to do so.[65] Similarly, the Quebec class action legislation gives a member of the class the right to appeal an adverse class determination with leave.[66]

3. APPEAL OF THE FINAL JUDGMENT ON THE COMMON QUESTIONS AND OF THE DETERMINATION OF INDIVIDUAL ISSUES

(a) Introduction

It will be recalled that the proposed Ontario class action procedure would permit the "bifurcation" of class proceedings following certification, that is, the determination of the questions common to the class, followed by proceedings to decide individual questions.[67] At either of these two stages in the class proceedings, appeal issues could arise. For example, in the event of a judgment on the common questions in favour of the class, the defendant

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[62] *Ibid.*, s. 37(2).

[63] *Ibid.*

[64] *Ibid.*, s. 37(3).

[65] *United Airlines, Inc. v. McDonald, supra*, note 48.

[66] C.C.P., *supra*, note 55, art. 1010.

[67] See *supra*, ch. 11, sec. 2.

might wish to appeal the finding of liability or, if an aggregate assessment has been ordered,[68] the quantum thereof. Similarly, a class member whose individual claim for damages has been reduced or rejected, or whose claim of reliance has not been accepted, might wish to have such a determination reviewed. In this section of the chapter, we shall consider the appeal issues that relate to each of these stages of the class proceedings.

(b) Appeal of the Judgment on the Common Questions

In a class action, the judgment that resolves the questions that are common to the class – for example, the general issue of the defendant's liability[69] – is a final judgment. Under section 28(1)(*a*) of the *Judicature Act*,[70] any final judgment or order of the High Court may be appealed as of right to the Court of Appeal. Similarly, section 34 of the *County Courts Act*[71] gives a right to appeal a final judgment of a county or district court judge to the Court of Appeal. There does not appear to be any persuasive reason why the appeal of a final judgment in a class action should be treated differently from the appeal of any other final judgment. Accordingly, we recommend that, under the proposed *Class Actions Act*, an appeal from a judgment on the questions common to the class should lie as of right to the Court of Appeal.[72]

The only class action provisions that we have considered that address the issue of the appeal of the judgment on the common questions are contained in the Quebec class action legislation.[73] Two relevant articles of the Quebec *Code of Civil Procedure* provide as follows:

> 1041. The final judgment is subject to appeal *pleno jure* [as of right] by a party.
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> 1042. If the representative does not appeal or if his appeal is dismissed for one of the reasons provided for in paragraph 1 or 3 of the first paragraph of article 501,[74] a member may, within sixty days following the date of the

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[68] For discussion of the concept of aggregate assessment, see *supra*, ch. 14, sec. 3.

[69] In certain other cases, where the facts of the particular action permit, the judgment on the common questions will consist of an aggregate assessment of monetary relief: see *supra*, ch. 14, sec. 3.

[70] *Judicature Act, supra*, note 3. See *supra*, this ch., sec. 2(a). See, also, Williston Committee Revised Judicature Act, *supra*, note 3, s. 15.

[71] *County Courts Act*, R.S.O. 1980, c. 100.

[72] See Draft Bill, s. 38(1).

[73] C.C.P., *supra*, note 55, arts. 1041-1044.

[74] Article 501(1) and (3) of the *Code of Civil Procedure*, R.S.Q. 1977, c. C-25, provides as follows:

> 501. Within ten days following the expiration of the delay fixed for appearance, the respondent may by motion ask for the dismissal of the appeal by reason of:
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> (1) an irregularity in the bringing of the appeal, when it causes him a prejudice;
>
> . . . .
>
> (3) acquiescence in the judgment appealed from;
>
> . . . .

publication of the notice contemplated in article 1030,[75] apply to the Court of Appeal for leave to appeal and to be substituted for the representative. The Court grants the motion if it is of opinion that the interest of the members so requires.

The delay provided for in this article is peremptory.

What is of particular significance in this legislation is the right of appeal afforded to absent class members under article 1042. The article provides that, if the representative plaintiff fails to appeal the final judgment, or if his appeal is dismissed for one of the reasons referred to in the section, an absent class member may apply to the Court of Appeal for leave to appeal and to be substituted for the representative plaintiff. The criterion for the granting of such relief is whether the court "is of opinion that the interest of the members so requires". It is the view of the Commission that, in the interest of safeguarding the rights of the absent class members, a similar provision should be included in the proposed Ontario class action statute. Accordingly, we recommend that, if the representative plaintiff does not appeal the judgment on the common questions or if he abandons his appeal, any member of the class should be able to apply to the Court of Appeal for leave to appeal on behalf of the class.[76]

(c) Appeal of the Determination of Individual Issues

A judgment on the common questions in favour of the class will, in many cases, be followed by individual proceedings to determine issues particular to members of the class.[77] In these proceedings, a class member may assert his individual claim and, in so doing, may be required to prove certain monetary or non-monetary issues. For example, the proceedings may involve the quantification of damages sustained by individual class members or issues of reliance or contributory negligence. Alternatively, the class action may have resulted in an aggregate award of monetary relief, which will be distributed to class members in a number of ways.[78] In either case, the result will be a judgment or an order of the court[79] resolving the dispute between the parties, which the parties or the class members may wish to appeal. After considering this issue, the Commission has decided that a provision should be inserted in the proposed *Class Actions Act* to control the appeal of orders or judgments

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The irregularity of the appeal for any of the grounds provided in paragraphs 2, 3 and 4 is not covered by the mere failure to invoke it within the delay fixed; but if an appeal is dismissed on a motion made beyond such delay, the costs shall be the same as if it had been made within the delay, unless the court otherwise decides.

[75] C.C.P., *supra*, note 55, art. 1030, provides, in part, as follows:

1030. When the final judgment acquires the authority of *res judicata*, the court of first instance orders the publication of a notice ....

[76] See Draft Bill, s. 38(2).

[77] See *supra*, ch. 15.

[78] See *supra*, ch. 14, sec. 3(c).

[79] See Draft Bill, ss. 23-26 and 31(4).

that determine individual issues relating to the liability of the defendant to class members or the quantum thereof, or to the distribution of shares of an aggregate award.

In arriving at this decision, the Commission has been influenced by section 108(*a*) of the *Small Claims Courts Act*,[80] which provides that an appeal lies to the Divisional Court in an action or proceeding where the sum in dispute exceeds $500, exclusive of costs. Where the sum in dispute is less than this amount, there is no appeal. While the Commission accepts the view that only claims of a certain amount should be subject to an absolute right of appeal – the rationale being that an unlimited right of appeal could place an onerous burden on judicial resources – we are of the opinion that a *de minimis* limit of $1,000, rather than $500, is more appropriate in the context of class actions.

However, unlike section 108(*a*) of the *Small Claims Courts Act*, we do not believe that claimants with awards under the *de minimis* limit should be prohibited from appealing. Rather, we are of the opinion that, although such a right should be restricted, it should be available with leave where there has been a substantial miscarriage of justice. As in the case of our recommendation with respect to the appeal of certification orders, the Commission is of the view that such appeals should be to the Divisional Court rather than to the Court of Appeal. Accordingly, the Commission recommends that, where there has been an aggregate award and a distribution of monetary relief pursuant thereto, or where judgment has been given following individual proceedings, any member of the class who has been awarded more than $1,000 should be able to appeal as of right to the Divisional Court.[81] However, any class member who wishes to appeal a judgment of $1,000 or less should be required first to obtain leave of the Divisional Court,[82] which should be granted only where there has been a substantial miscarriage of justice.[83]

We appreciate, of course, that an appeal may involve a non-monetary issue and, as will be noted, the statutory provisions that we have recommended apply to such appeals in the same way that they apply to appeals that raise a monetary issue. For example, a class member who is required to prove both reliance and the quantum of his damages in an individual proceeding may fail to prove the issue of reliance. His claim for damages, therefore, would be dismissed. In this case, the amount awarded to the class member is clearly less than $1,000; accordingly, if he wishes to appeal the court's decision on the reliance issue, he would be required under our recommendations to apply to the Divisional Court for leave to appeal and to prove that there has been a substantial miscarriage of justice. Another example would be where a class member's claim for $1,500 is reduced by the court to $500 as a result of a successful defence of contributory negligence. If the class member wishes to

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[80] R.S.O. 1980, c. 476. See Davies, *McKeon's Small Claims Court Handbook* (3d ed., 1975), at 89.

[81] See Draft Bill, s. 39(1).

[82] *Ibid.*

[83] *Ibid.*, s. 39(4).

appeal the issue of contributory negligence, he also would be required to seek leave because the amount awarded to him was less then the *de minimis* statutory amount.

To this point in our discussion, we have referred to the right of a class member to appeal a determination of an issue that he considers adverse. We see no reason to differentiate in this regard between a class member and the defendant. We recommend, therefore, that the defendant should be afforded the right to appeal to the Divisional Court a judgment that determines an individual issue in favour of a class member where the award to the member exceeds $1,000. Where the award is $1,000 or less, we recommend that the defendant should be able to apply to the Divisional Court for leave to appeal such an award on the basis that a substantial miscarriage of justice has occurred.[84]

To complete our discussion of issues that arise in the context of appeals of the determination of individual issues, one special point requires further comment. In the course of the distribution of an aggregate award of monetary relief, it may be alleged that an individual class member is not entitled to participate or that the amount awarded to the class member is excessive. Upon whom should the right of appeal be conferred in such circumstances? The defendant will have no interest in the distribution of the aggregate assessment; his liability to the class will be discharged upon payment of the amount assessed. It would seem logical to vest the right of appeal in the representative plaintiff who, in this way, can protect the interests of the class as a whole. Accordingly, the Commission recommends that, where there has been an aggregate award and a distribution of monetary relief to class members pursuant thereto, the representative plaintiff should be permitted to appeal to the Divisional Court an award to a member of the class for more than $1,000. If the award to the class member is $1,000 or less, we recommend that the representative plaintiff should be able to apply to the Divisional Court for leave to appeal, which should be granted only where there has been a substantial miscarriage of justice.[85]

4. APPEAL ISSUES ARISING OUT OF *CY-PRÈS* AND FORFEIT DISTRIBUTIONS

In chapter 14, we discussed the possibility that, after all feasible attempts at individual distribution of an aggregate award have been made, there nevertheless may be a residue of the award. In this event, we recommended that the court should be able to order a *cy-près* distribution of the residue, that is, that the residue be applied in a manner that may reasonably be expected to benefit some or all of the members of the class.[86] We also recommended that, should no form of *cy-près* distribution be possible, the court should be able to order that the residue of the fund either be forfeited to the Crown or returned unconditionally to the defendant.[87] We recommended that, prior to any of

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[84] *Ibid.*, s. 39(3) and (4).

[85] *Ibid.*, s. 39(2) and (4).

[86] See *supra*, ch. 14, sec. 3(c)(v).

[87] See *supra*, ch. 14, sec. 3(c)(vi).

these types of distribution, notice should be given to the Attorney General in order to obtain his views as to whether the proposed distribution is in the public interest.[88]

The Commission is of the view that the parties to the action or the Attorney General might wish to appeal a court order with respect to these types of distribution. It is possible, for example, that the class representative might assert that the particular *cy-près* distribution scheme ordered by the court would be ineffective in benefiting the uncompensated class members. A defendant, who may have committed only a technical breach of the law, and who seeks an unconditional return of the residue of the fund, might wish to appeal an order implementing a particular *cy-près* distribution or an order awarding the residue to the Province of Ontario. Furthermore, the Attorney General might consider that the public interest would be better promoted by an alternative method of distribution.

Accordingly, we recommend that, where the court orders a *cy-près* distribution, or makes an order that the residue of the fund be forfeited to the Crown or returned unconditionally to the defendant, the representative plaintiff, the defendant or the Attorney General should be able to appeal as of right to the Court of Appeal.[89] As appeals of this nature will concern matters of public interest, rather than individual issues and, as we do not anticipate that they will frequently occur, it will be noted that we have selected as the appropriate forum the Court of Appeal.

Recommendations

The Commission makes the following recommendations:

1. Where an order has been made certifying or refusing to certify an action as a class action or decertifying a class action, an appeal as of right from such order should lie to the Divisional Court.

2. Where an order has been made amending an order certifying an action as a class action, an appeal from such order by the representative plaintiff or by the defendant should lie, with leave of a judge of the High Court, to the Divisional Court.

3. Where the representative plaintiff does not appeal an order refusing to certify an action as a class action, or an order decertifying a class action, or an order amending an order certifying an action as a class action, or where he abandons his appeal, any member of the class should be permitted to apply to a judge of the High Court for leave to appeal on behalf of the class.

4. An appeal by the representative plaintiff or by the defendant of the judgment on the questions common to the class should lie as of right to the Court of Appeal.

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[88] See *supra*, ch. 14, sec. 3(c)(v)g. and (vi)d.

[89] See Draft Bill, s. 40.

5. Where the representative plaintiff does not appeal the judgment on the questions common to the class, or where he abandons his appeal, any member of the class should be permitted to apply to the Court of Appeal for leave to appeal on behalf of the class.

6. Where there has been an aggregate award and a distribution of monetary relief pursuant thereto, or where judgment has been given following individual proceedings, any member of the class who has been awarded more than $1,000 should be able to appeal as of right to the Divisional Court, and any member of the class who has been awarded $1,000 or less should be permitted to apply to the Divisional Court for leave to appeal, which should be granted only where there has been a substantial miscarriage of justice.

7. Where there has been an aggregate award and a distribution of monetary relief pursuant thereto, the representative plaintiff should be able to appeal as of right to the Divisional Court an award to a class member for more than $1,000, and, where the award to the class member is $1,000 or less, the representative plaintiff should be able to apply to the Divisional Court for leave to appeal, which should be granted only where there has been a substantial miscarriage of justice.

8. Where judgment has been given in individual proceedings, the defendant should be able to appeal as of right to the Divisional Court an award to a class member for more than $1,000, and, where the award to the class member is $1,000 or less, the defendant should be able to apply to the Divisional Court for leave to appeal, which should be granted only where there has been a substantial miscarriage of justice.

9. Where the court orders a *cy-près* distribution or makes an order that the residue of an aggregate assessment be forfeited to the Crown or returned unconditionally to the defendant, the representative plaintiff, the defendant and the Attorney General should be able to appeal the order as of right to the Court of Appeal.

CHAPTER 22

MISCELLANEOUS ISSUES

In this chapter, we shall discuss several issues of a general nature. The first matter relates to the use of statistical, including sampling, evidence in class actions. Secondly, we shall discuss three matters concerning the scope or operation of the proposed *Class Actions Act*, namely, the applicability of the Act to the Crown, the types of class action comprehended by the Act, and the question of the retrospective or prospective operation of the Act.

1. STATISTICAL EVIDENCE IN CLASS ACTIONS

(a) Introduction

The use of statistical material is one outgrowth of a mass-production economy, in which manufacturers and sellers are involved in transactions on a national or even world-wide scale. To administer an enterprise efficiently, it is frequently necessary to obtain information concerning the views of large numbers of persons, or to compile data on the nature and effectiveness of various products. This need has prompted the development of techniques that permit the measurement of various matters where numerous persons or objects are involved; these techniques may include surveying either all members or items of the relevant "universe",[1] or a smaller but representative sample of such members or items in contexts where consultation with, or testing of, all of them is impracticable for financial or other reasons.

When legal disputes arise involving businesses or the government, in which the impact of a particular product or practice upon markets composed of many persons is in issue, traditional means of proof create serious problems of manageability for both the courts and the parties.[2] Accordingly, it is not surprising that these litigants seek to introduce as evidence the statistical material that has become a useful tool in their day-to-day affairs.[3]

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[1] "Universe" is "the technical term for the group from which a sample is taken": Zeisel, "The Uniqueness of Survey Evidence" (1960), 45 Cornell L. Q. 322, at 326. In a class action, the universe will frequently be the entire class or their claims.

[2] In the United States context, see, for example, *Life Savers Corp. v. Curtiss Candy Co.*, 87 F. Supp. 16 (N.D. Ill. 1949), at 17.

[3] The use of statistical material as legal evidence has received a great deal of attention in the United States: see, for example, Zeisel, *supra*, note 1; Barksdale, *The Use of Survey Research Findings as Legal Evidence* (1957); Note, "Opinion Polls and the Law of Evidence" (1976), 62 Va. L. Rev. 1101; McElroy, "Public Surveys – The Latest Exception to the Hearsay Rule" (1976), 28 Baylor L. Rev. 59; Sorensen and Sorensen, "The Admissibility and Use of Opinion Research Evidence" (1953), 28 N.Y.U. L. Rev. 1213; and Note, "Public Opinion Surveys as Evidence: The Pollsters Go to Court" (1953), 66 Harv. L. Rev. 498.

In the context of class actions, similar problems of manageability regarding the proof of liability issues may arise, because classes may comprise large numbers of persons. Problems of manageability may also arise in administering notice or in the assessment and distribution of monetary relief where the class is very large, because these procedures are directed to or involve all members of a class. Accordingly, if some means could be employed that would reliably determine, for example, class members' perception of the adequacy of a proposed settlement,[4] or issues relating to monetary relief, without interviewing each class member, this would diminish the burdens that class actions might impose upon the courts and the parties. It has been suggested that the use of statistical evidence and, in particular, sampling evidence, could facilitate the efficient administration of class actions.[5]

Nonetheless, several hurdles face the introduction of statistical material as evidence, whether as a means of facilitating proof of the cause of action or of administering various class action procedures. Before turning to a discussion of the development of the law relating to the admission of such evidence, however, it is important to note the distinction between two types of statistic, namely, "census" statistics and "sampling" statistics. These statistics differ in their relationship to the "universe" of people or objects about which information is to be gathered.[6]

Census statistics provide information about all persons or objects in the universe, whereas sampling statistics are based upon information gathered about a smaller number of individuals or objects within the universe, for the purpose of estimating particular characteristics of the universe as a whole.[7] For example, the figures gathered by the Administrative Office of the United States Courts are census statistics, since they involve data filed with respect to all class actions in progress or terminated in the United States federal courts.[8] If one were to select randomly from this universe of all class actions in the United States federal courts a more limited number of class actions in a particular year, with a view to drawing general conclusions about American class actions brought under Federal Rule 23, any statistical evidence thus obtained would constitute sampling statistics.

Statistics of either kind may be compiled from verbal statements relating to some matter, or may be derived from an analysis of other, non-verbal

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[4] See *supra*, ch. 20, for a discussion of the Commission's proposed settlement procedure.

[5] See Shlachter, "The Case for the Fluid Class Recovery" (1972), 1 C.A.R. 70, at 74-75; Moore, "The A.B.A., the Congress and Class Actions: A Report" (1974), 3 C.A.R. 36, at 55; Note, "Federal Consumer Class Action Legislation" (1975), 4 C.A.R. 3, at 19-21; Shapiro and Springer, "Management of Consumer Class Actions after *Eisen*: Notice and Determination of Damages" (1975), 26 Mercer L. Rev. 851, at 866; Note, "Developments in the Law – Class Actions" (1976), 89 Harv. L. Rev. 1318, at 1520; and Newberg, *Newberg on Class Actions* (1977), Vol. 3, §4620, at 88.

[6] See *supra*, note 1. See, also, Barksdale, *supra*, note 3, at 17.

[7] See Barksdale, *ibid.*, at 17.

[8] *Annual Report of the Director of the Administrative Office of the United States Courts*, in *Reports of the Proceedings of the Judicial Conference of the United States*, for the years 1972 to 1978. For a further discussion of these statistics, see *supra*, ch. 4, sec. 1(b)(xii).

information.[9] For example, statistics collected by government census operations, opinion polls, and other surveys in which data is collected by interview or completion of a form would fall into the first category. Samples designed to measure air pollution or the physical composition of a particular product would fall into the second.

The evidentiary problems relating to the use of census and sampling statistics are similar in one respect, and different in another. Both types of statistic, when tendered as proof of the truth of the assertions contained therein, constitute hearsay and, according to traditional rules of evidence, are inadmissible, unless they come within the ambit of one of the several exceptions to the hearsay rule. With respect to sampling statistics, there exists an additional issue, namely, that their reliability might be questioned in that they are based upon a sample instead of upon an examination of every person or every object within the universe. Having regard to these evidentiary difficulties, we now turn to a brief examination of the approaches taken to the admissibility of statistical evidence in the United States and Canada.

(b) Admissibility of Statistical Evidence in Individual Suits

(i) United States

Generally speaking, American courts have had little difficulty in admitting as evidence census statistics prepared by government agencies.[10] Regarding the use of sampling statistics, American courts have tended to focus upon the issue of reliability;[11] if a sample is reliable, courts have admitted such evidence to show a state of mind[12] or to provide a basis for expert testimony.[13] However, it should be noted that statistical material so admitted is limited to these purposes and is not tendered for the truth of the matters asserted therein. Some American courts have gone further, and have stated that statistical material itself may be admitted as proof of the facts contained therein[14] – at least in cases where there is a compelling necessity for the

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[9] See Zeisel, *supra*, note 1, at 323.

[10] See *ibid.*, at 324-25.

[11] For a discussion of the differences between census and sampling evidence and of the relationship between the "hearsay" and "reliability" issues, see *ibid.*, at 323-24 and 334 *et seq.*

[12] See *United States v. 88 Cases*, 187 F.2d 967 (3d Cir. 1951), at 974, *cert.* denied 342 U.S. 861 (1951). See, also, Zeisel, *supra*, note 1, at 333-34.

[13] See *Bair v. American Motors Corp.*, 473 F.2d 740 (3d Cir. 1973). See, also, Zeisel, *supra*, note 1, at 334.

[14] Certain American courts and administrative agencies operating under the common law have, on occasion, admitted survey evidence of facts that appear to be hearsay, although the reason for the exception to the hearsay rule has not always been clear: see, for example, *United States v. United Shoe Machinery Corp.*, 110 F. Supp. 295 (D. Mass. 1953), at 298-99; *Eighth Avenue Coach Corp. v. City of New York*, 10 N.Y.S. 2d 170 (1939), at 180-81; *United States v. E.I. Du Pont De Nemours and Co.*, 177 F. Supp. 1 (N.D. Ill. 1959), at 18-19; *United States v. Aluminum Co. of America*, 35 F. Supp. 820 (S.D.N.Y. 1940), at 823; and *In re Crown Zellerbach Corp.*, 51 F.T.C. 1105 (1955).

admission of such evidence because of problems relating to either the manageability of the action or the absence of other suitable means of proof – if expert testimony indicates that the sampling techniques are reliable and if the nature of the evidence suggests that the dangers that ordinarily lead to the rejection of hearsay evidence are absent.[15] Indeed, one American court, in the context of an individual antitrust action, observed that, "[i]f anti-trust trials are to be kept manageable, samples must be used, and a sample which is in general reasonable should not be rejected in the absence of the offer of a better sample".[16]

More recently, the United States federal courts have adopted new Rules of Evidence,[17] which have some ramifications for the admission of statistical, including sampling, material as evidence. Federal Evidence Rule 703 permits data reasonably relied upon by experts in a particular field, such as statistics, to form a basis for expert testimony, even if the data itself would not be admissible. Moreover, Federal Evidence Rule 803(17) creates a hearsay exception for "market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations". Finally, Federal Evidence Rule 803(24) codifies the "best evidence" standard suggested by certain American cases, and authorizes the admission of hearsay evidence where "there are circumstantial guarantees of trustworthiness", "the statement is more probative on

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[15] See, for example, *Zippo Manufacturing Co. v. Rogers Imports, Inc.*, 216 F. Supp. 670 (S.D.N.Y. 1963), an unfair competition case, at 683 and 684 (footnotes omitted):

> [T]he determination that a statement is hearsay does not end the inquiry into admissibility; there must still be a further examination of the need for the statement at trial and the circumstantial guaranty of trustworthiness surrounding the making of the statement. This approach has been used to justify the admissibility of a survey. Necessity in this context requires a comparison of the probative value of the survey with the evidence, if any, which as a practical matter could be used if the survey were excluded. If the survey is more valuable, then necessity exists for the survey, i.e., it is the inability to get 'evidence of the same value' which makes the hearsay statement necessary.
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> . . . .
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> The second element involved in this approach is the guaranty of trustworthiness supplied by the circumstances under which the out-of-court statements were made. A logical step in this inquiry is to see which of the hearsay dangers are present . . . . [In this case] the only appreciable danger is that the respondent is insincere. But this danger is minimized by the circumstances of this or any public opinion poll in which scientific sampling is employed, because members of the public who are asked questions about things in which they have no interest have no reason to falsify their feelings. While the sampling procedure substantially guarantees trustworthiness insofar as the respondent's sincerity is concerned, other survey techniques substantially insure trustworthiness in other respects. If questions are unfairly worded to suggest answers favorable to the party sponsoring the survey, the element of trustworthiness in the poll would be lacking. The same result would follow if the interviewers asked fair questions in a leading manner. Thus, the methodology of the survey bears directly on trustworthiness, as it does on necessity.

[16] *United States v. United Shoe Machinery Corp., supra*, note 14, at 305-06.

[17] *Rules of Evidence for United States Courts and Magistrates*, Pub. L. No. 93-595, 88 Stat. 1926 (1974), as amended to July 15, 1978 (hereinafter referred to as "U.S. Federal Evidence Rules").

the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts", "the interests of justice will best be served by admission of the statement into evidence", and the admission is made known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it.[18]

(ii) Canada

Canadian courts have not been as willing as their American counterparts to admit statistical material as evidence. For example, while American courts readily admit government census data,[19] in Ontario this type of statistical information was ruled inadmissible in *R. v. Northern Electric Co., Ltd.*[20] on the basis that, "[a]lthough they are made for the use of the public they can gain little or no authority by reason of the public or any member of the public being in a position to challenge or dispute them, because the constituent material that goes to make up the reports is secret".[21] By contrast, American commentators have suggested that the secrecy of census data is one of the more important factors contributing to its reliability.[22]

Discussions in Canada of the use of statistical evidence from non-public sources have focused upon the admissibility of such evidence to establish either community standards in obscenity cases or the possibility of public confusion in trademark suits.[23] In both these areas, courts have shown some

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[18] See, also, Federal Judicial Center, Board of Editors, *Manual for Complex Litigation* (1978) (Clark Boardman), §2.712, at 186-89, which outlines the usefulness of statistical evidence and specifies the procedures that should apply when it is admitted under the new evidence rules in all forms of complex litigation, including class actions.

[19] See Zeisel, *supra*, note 1, at 324-25.

[20] [1955] O.R. 431, [1955] 3 D.L.R. 449 (H.C.J.) (subsequent references are to [1955] O.R.). In that combines case, counsel attempted to introduce Dominion Bureau of Statistics figures concerning total production of electrical wire and cable in Canada for certain years so that the relative percentage produced by the defendants in the case could be determined. Counsel contended that the report of the Dominion Bureau of Statistics was a public document and therefore admissible under the common law exception to the hearsay rule that is applicable to such documents.

[21] *Ibid.*, at 468. It is of interest to note that this decision has been criticized on the basis that the principal foundation of the public documents exception to the hearsay rule is not the possibility that the accuracy of such documents may be challenged by the public because of their accessibility, as the *Northern Electric* case suggested, but rather the inconvenience of insisting on other means of proof: see Sopinka and Lederman, *The Law of Evidence in Civil Cases* (1974), at 109.

[22] See Zeisel, *supra*, note 1, at 325.

[23] See, for example, *R. v. Times Square Cinema Ltd.*, [1971] 3 O.R. 688, 4 C.C.C. (2d) 229 (C.A.) (subsequent references are to [1971] 3 O.R.); *R. v. Prairie Schooner News Ltd.* (1970), 75 W.W.R. 585, 1 C.C.C. (2d) 251 (Man. C.A.); *R. v. Pipeline News*, [1972] 1 W.W.R. 241, 5 C.C.C. (2d) 71 (Alta. Dist. Ct.); *Aluminum Goods Ltd. v. Registrar of Trade Marks*, [1954] Ex. C.R. 79, 19 C.P.R. 13; *Building Products Ltd. v. B.P. Canada Ltd.* (1961), 36 C.P.R. 121, 21 Fox Pat. C. 130 (Ex. Ct.); *Cochrane-Dunlop Hardware Ltd. v. Capital Diversified Industries Ltd.* (1973), 11 C.P.R. (2d) 137 (Ont. H.C.J.); *Canadian Schenley Distillery Ltd. v. Canada's Manitoba Distillery Ltd.* (1975), 25 C.P.R. (2d) 1 (F.C.T.D.); *R. v. Murphy*, [1969] 4 C.C.C. 146, 4 D.L.R. (3d) 289 (N.B.C.A.); Sopinka and Lederman, *supra*, note 21, at 321-24; Lamont, "Public Opinion Polls and

willingness to consider the admission of sampling evidence, primarily as forming the basis for expert testimony; however, at least in the obscenity cases, the quality of the surveys has been so poor that the courts have not afforded them any weight.[24]

The more scientific surveys carried out on behalf of members of the commercial community, on the other hand, have received a more sympathetic reception. For example, in a trademark case, *Cochrane-Dunlop Hardware Ltd. v. Capital Diversified Industries Ltd.*,[25] the Court admitted a consumer survey, although it did not indicate which exception to the hearsay rule was applicable; in any event, the Court decided that the statistical evidence was entitled to no weight because it was equivocal. More recently, again in the context of trademark litigation, the Court in *Canadian Schenley Distillery Ltd. v. Canada's Manitoba Distillery Ltd.*[26] was prepared to permit the use of statistical evidence as a basis for expert testimony. The Court stated as follows:[27]

> [T]he admissibility of survey evidence and the probative value of that evidence when admitted is dependent on how the poll was conducted, the questions asked, how they were asked and how they were framed and what purpose the evidence is to be used for. There would be no objection to the evidence being admissible when the poll is put forward not to prove the truth of the statements it contains but merely to show the basis of an expert's opinion, or as in the present instance, an assessment of the results of the survey.

In one area, recent federal legislation has expressly recognized the utility of statistical material. The *Combines Investigation Act*[28] provides, in part, as follows:

> 45.1.-(1) A collection, compilation, analysis, abstract or other record or report of statistical information prepared or published under the authority of

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Survey Evidence in Obscenity Cases" (1973), 15 Crim. L.Q. 135; Goldman, "The Use of Learned Treatises in Canadian and United States Litigation" (1974), 24 U. Toronto L.J. 423; Rafalko, "Sociological Evidence as a Criminal Defence" (1967), 10 Crim. L.Q. 77; McDonald, "Contempt of Court: An Unsuccessful Attempt to Use Sociological Evidence" (1970), 8 Osgoode Hall L.J. 573; and authorities cited in Fox, *The Canadian Law of Trade Marks and Unfair Competition* (3d ed., 1972), at 449, *nn.* 948 and 949.

[24] For example, in *R. v. Times Square Cinema Ltd., supra*, note 23, the Ontario Court of Appeal agreed that the trial judge was correct in refusing to admit the particular surveys in issue, because they were "so unsatisfactory and inconclusive of a fair test of community standards of acceptance as to have no probative value whatever": see Gale C.J.O., at 691. Nonetheless, two of the three justices expressed a willingness to permit expert evidence based upon a poll to go before a jury, if the manner of taking the poll and the manner in which questions were asked were up to acceptable standards: see the judgments of McGillivray J.A., at 693-95, and Jessup J.A., at 699.

[25] *Supra*, note 23.

[26] *Ibid.*

[27] *Ibid.*, at 9.

[28] R.S.C. 1970, c. C-23, as am. by S.C. 1974-75-76, c. 76, s. 22, enacting ss. 45.1 - 45.3 of the *Combines Investigation Act* (hereinafter referred to as "Combines Act Statistical Amendments").

(*a*) the *Statistics Act*, or

(*b*) any other enactment of Parliament or of the legislature of a province,

is admissible in evidence in any proceedings before the Commission or in any prosecution or proceedings before a court under or pursuant to this Act.

. . . .

45.2. A collection, compilation, analysis, abstract or other record or report of statistics collected by sampling methods by or on behalf of the Director or any other party to proceedings before the Commission, or to a prosecution or proceedings before a court under or pursuant to this Act, is admissible in evidence in any such prosecution or proceedings.

45.3.-(1) No record, report or statement of statistical information or statistics referred to in section 45.1 or 45.2 shall be received in evidence before the Commission or court unless the person intending to produce the record, report or statement in evidence has given to the person against whom it is intended to be produced reasonable notice together with a copy of the record, report or statement and, in the case of a record or report of statistics referred to in section 45.2, together with the names and qualifications of those persons who participated in the preparation thereof.

(2) Any person against whom a record or report of statistics referred to in section 45.1 is produced may require, for the purposes of cross-examination, the attendance of any person under whose supervision the record or report was prepared.

(3) Any person against whom a record or report of statistics referred to in section 45.2 is produced may require, for the purposes of cross-examination, the attendance of any person who participated in the preparation of the record or report.

It will be noted that these sections render admissible as evidence not only statistics collected by both federal and provincial government bodies, but also private statistics collected on a sampling basis by any party to a combines proceeding. In addition, the statutory provisions ensure that the opposing party is given reasonable notice that such evidence is to be used against him or her, as well as the information and opportunity to permit effective testing of the accuracy of the evidence. However, since this legislation is restricted to disputes involving alleged competition law violations, the status of statistical evidence in litigation in other substantive law areas remains to be decided under the common law.[29]

Thus, while there is a trend for American courts to admit statistical evidence from both public and private sources in appropriate nonclass action cases, the Canadian position, except in certain specialized instances, is somewhat more restrictive.

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[29] It should be noted that, where the statistical material has been "made in the usual and ordinary course of any business", and "it was in the usual and ordinary course of such business to make such writing or record", it might be admissible under the statutory exception to the hearsay rule provided for business records, which includes "any information that is recorded or stored by means of any device": see Ontario *Evidence Act*, R.S.O. 1980, c. 145, s. 35.

(c) The Use of Statistical Evidence in Class Actions in the United States

In class actions in the United States, reliable statistical evidence has been of substantial value in a variety of circumstances, where there has been a need to involve members of a class in particular aspects of the proceedings. For example, where an average distribution of monetary relief[30] has been necessary, statistical evidence has been used to determine the average share to which a particular class member is entitled, by dividing the class into categories of class members with shared characteristics.[31] Such evidence also has been employed in class actions in relation to non-monetary issues, for example, in establishing liability[32] and in determining the nature of future corrective conduct.[33]

The most controversial use of statistical evidence proposed for class actions is to provide a factual basis for aggregate awards of monetary relief[34] or to avoid the need for individual testimony of class members concerning other elements of the cause of action. To the extent that the use of evidence of this kind permits aggregate awards of monetary relief where they would not otherwise be feasible, or in some other way reduces the issues that require individual proof, the number of class actions that will be refused certification – either because common questions do not predominate or because the class

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[30] See *supra*, ch. 14, sec. 3(c)(iv), for a discussion of average distribution of monetary relief.

[31] An illustration of this use of statistical evidence occurred in *In re Arizona Bakery Products Litigation*, 1976-2 Trade Cases ¶61,120 (D. Ariz.), where sampling procedures were used to gather information about average expenditures on bakery products by households of different sizes. It is of interest to note that, in the *Arizona Bakery Products* case, at 70,077-78, the judge found that the survey was admissible because it was "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences on the subject in accordance with Rule 703, Federal Rules of Evidence": see, *supra*, this ch., sec. 1(b)(i). Similar use was made of statistical evidence in *In re Arizona Dairy Products Litigation*, 1979-1 Trade Cases ¶62,605 (D. Ariz.).

[32] In *Biechele v. Norfolk & Western Railway Co.*, 309 F. Supp. 354 (N.D. Ohio 1969), a class action seeking an injunction and damages was launched on the ground that a railroad's operation of a coal storage and shipping facility was damaging the surrounding residents through drifting dust. The Court relied on samples relating to air pollution and the composition of the dust in determining that the defendant was responsible for the harm done to the class members: *ibid.*, at 357. The Court concluded, however, that the determination of the amount of damages to be received by each of the 731 plaintiffs would require individual evidence unless the amounts could be stipulated, and ordered that the individual awards should be referred to a special master for determination: *ibid.*, at 358-59.

[33] For example, in *Rosado v. Wyman*, 322 F. Supp. 1173 (E.D.N.Y. 1970), a class action challenging the validity of a provision of the New York Social Services Law on the basis that it failed to meet federal standards set for participation in a particular federally-funded program, the District Court ordered the parties to undertake a sample study of the New York case records in a specific past year to determine the "average value per recipient per month" of certain special need items, which was relevant to a determination of the level of payments that the state would have to maintain in future to be eligible for federal funding. The Court of Appeals for the Second Circuit upheld the order of the District Court and the determination that resulted therefrom: *Rosado v. Wyman*, 437 F.2d 619 (2d Cir. 1970).

[34] See *supra*, ch. 14, sec. 3, for a discussion of aggregate awards of monetary relief.

action is unmanageable – may be reduced.[35] That the use of statistical evidence may broaden the range of actions in which aggregate assessment of monetary relief or common proof of other issues is feasible can be seen by comparing the decisions of two class actions involving gasoline price-fixing, *City of Philadelphia v. American Oil Co.*[36] and *In re Independent Gasoline Antitrust Litigation.*[37]

In the *City of Philadelphia* case, the Court refused to certify the class action or to contemplate an aggregate award of damages for a variety of reasons, including the fact that, over the ten year period involved, class members would have made cash purchases of gasoline at many different stations and at many different prices.[38] In other words, although many class members would have bought gasoline from the same stations at the same prices at a particular point in time, the large number of class members and gas stations, the absence of records of cash transactions, and the long period of time involved, would make a non-statistical determination of damages very difficult. The Court, it would seem, was not offered statistical evidence as a means of proof, so that its refusal to certify the class action is not surprising.

By contrast, in the *Independent Gasoline Antitrust Litigation* case, the plaintiffs expressly suggested at the time of the certification hearing that statistical evidence should be used to establish a formula defining the amount of the price increase attributable to the alleged conspiracy. Justice Blair noted that, if the plaintiffs' statistical analysis succeeded in defining the proportion of the purchase price attributable to the price-fixing, damage calculation would be reduced to the application of a mathematical formula and, therefore, there would be no need to adduce individual evidence of gasoline purchases. On this basis, Justice Blair allowed the class action to proceed.[39]

In *In re Sugar Industry Antitrust Litigation*,[40] the Court grappled directly

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[35] Proponents of the use of statistical evidence in class actions have tended to focus on the utility of such evidence in facilitating aggregate awards: see Shlachter, *supra*, note 5, at 74-75; Moore, *supra*, note 5, at 55; and Note, "Federal Consumer Class Action Legislation", *supra*, note 5, at 19-21. But see Shapiro and Springer, *supra*, note 5, at 866. It should not be assumed, however, that it is only class actions advocates who favour the use of statistical evidence. Indeed, in one settled class action in the United States – *Eovaldi v. First National Bank of Chicago*, 71 F.R.D. 334 (N.D. Ill. 1976) – the defendant suggested that the use of a sample was the most reasonable means of establishing the actual damages suffered by class members as a result of a truth in lending violation. The judge endorsed this approach in the face of opposition by the plaintiff, on the ground that other practical procedures would produce no better results: *ibid.*, at 336-37.

[36] 53 F.R.D. 45 (D. N.J. 1971).

[37] 1978-1 Trade Cases ¶62,085 (D. Md.).

[38] *Supra*, note 36, at 72.

[39] Although the Court did not permit an aggregate assessment of monetary relief, this did not reflect problems with the statistical evidence, but rather reflected the District Court's obedience to the judgment of the Fourth Circuit in *Windham v. American Brands, Inc.*, 565 F.2d 59 (4th Cir. 1977), that aggregate assessment of monetary relief was never proper: see *In re Independent Gasoline Antitrust Litigation, supra*, note 37, at 74,730. For further discussion of the the general propriety of aggregate assessment see *supra*, ch. 14, sec. 3(b)(i).

[40] 73 F.R.D. 322 (E.D. Penn. 1976).

with the relationship between statistical evidence and aggregate awards of monetary relief. The Court observed:[41]

> At this time, it is the feeling of this Court that the most suitable procedure for the determination of damages sustained by the proposed consumer classes in this litigation, if any, is either by an aggregate class-wide approach or through individualized evidence based on proven and accepted statistical methods. Neither method creates problems of manageability in the proof of plaintiffs' damages nor does either of these methods of proof deny defendants the right to present appropriate rebuttal evidence . . . .
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> [If the] argument – that the technique of aggregate damages prejudicially compromises defendants' substantive rights – ever had any validity, it is now of only historical interest. If proof of damages through statistical methods modifies pre-existing practice, it is a modification that results from the congressional enactment of Rules 703 [relating to the admission of statistics to form a basis for expert testimony] and 403 [relating to the exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time] . . . .[42]

While the cases discussed above are clearly not exhaustive,[43] they do

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[41] *Ibid.*, at 351 and 353.

[42] In other words, it appears that the Court in the *Sugar Industry Antitrust Litigation* case was of the view that the statutory Federal Rules of Evidence relating to statistical evidence have overcome the objections raised previously that aggregate awards involve a change in the substantive law, at least when the amount of such an award can be established by statistical evidence: see, generally, *supra*, ch. 14, sec. 3(a), for a discussion of this point.

Another objection frequently raised in the United States to aggregate awards involving the use of statistical evidence is that proof by such evidence is a violation of the constitutional guaranty of due process: see, for example, *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation*, 1978-1 Trade Cases ¶61,839 (C.D. Cal.), at 73,497.

It is difficult to see why the use of statistical evidence can be consistent with the due process provision of the United States Constitution when used in conflicts between competing businesses or between a particular business and the government, as in antitrust and trademark litigation, where most of the American decisions upholding the admissibility of survey evidence have been made, while the use of the same kind of evidence against a defendant in a class action is inconsistent with the due process requirement. When Lord J. was presented with similar arguments against the use of statistical evidence to establish the amount of an aggregate award in *In re Antibiotic Antitrust Actions*, 333 F. Supp. 278 (S.D.N.Y. 1971), he stated, at 289:

> Most important management decisions in the business world in which these defendants operate are made through the intelligent application of statistical and computer techniques and these class members should be entitled to use the same techniques in proving the elements of their cause of action. The court is confident that they can be successfully utilized in the courtroom and that their application will allow the consumers to protect their rights while freeing the court and the defendants of the specter of unmanageability.

See, also, *supra*, ch. 14, sec. 3(a).

[43] See, for example, *Neely v. United States*, 546 F.2d 1059 (3d Cir. 1976), where the Court of Appeals for the Third Circuit appeared to be of the view that government statistical data might be of assistance in determining whether a class action seeking the return of all fines, penalties, and costs relating to certain unconstitutional wagering convictions was manageable, although it is unclear how the Court believed that this evidence could be used: see *ibid.*, at 1071.

represent a cross-section of circumstances in which courts have viewed statistical evidence as necessary to preserve a class action aggregating meritorious claims. That there is some perceived need to amend traditional rules of evidence, insofar as the use of statistical evidence in class actions and nonclass actions is concerned, is also made manifest in several proposals for reform in other jurisdictions. It is to a brief discussion of some of these proposals that we now turn.

(d) Proposals for Reform in Other Jurisdictions

Several law reform bodies have recently offered proposals for reform that would further erode the rule against hearsay by permitting a more extended use of statistical evidence in civil litigation, both in the class action and nonclass action context. For example, in 1975, the Law Reform Commission of Canada published its final *Report on Evidence*,[44] which contained a proposed new Evidence Code. The following recommended provisions, setting forth certain exceptions to the hearsay rule, are germane to our discussion:[45]

> 31. The following are not excluded by section 27:
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> . . . .
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> (*b*) records, reports or statements of public offices or agencies, setting forth the activities of the office or agency, matters observed pursuant to a duty imposed by law, or in civil cases and against the prosecution in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law;
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> (*c*) records or data compilations of vital statistics if the report thereof was made to a public office pursuant to requirements of law;
>
> . . . .
>
> (*g*) market quotations, tabulations, lists, directories or other compilations generally used and relied upon by the public or by persons in particular occupations . . . .

The above provisions not only would expand the existing common law "public document" exception to the hearsay rule, but also, under section 31(*c*) and (*g*), respectively, would permit the use of vital statistics records, and survey evidence from other public sources. In respect of the latter exception, the Law Reform Commission stated:[46]

> Paragraph (*g*): Market reports and other commercial tabulations are clearly hearsay when offered to prove matter asserted in them and are consequently

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[44] Law Reform Commission of Canada, *Report on Evidence* (1975) (hereinafter referred to as "Federal Report on Evidence").

[45] Proposed s. 31(*b*), (*c*), and (*g*), corresponds to Rule 803(8), (9), and (17), respectively, of the U.S. Federal Evidence Rules, *supra*, note 17. See, also, Law Reform Commission of Canada, Law of Evidence Project, *Evidence: 9. Hearsay* (1974), the study paper that preceded the final Report.

[46] Federal Report on Evidence, *supra*, note 44, at 75.

> inadmissible under present law. However, they appear sufficiently trustworthy and the inconvenience of obtaining the information in other ways is so great that they should be admissible as an exception to the hearsay rule. The authors of the reports are often inaccessible; the reports are relied upon by experts and are therefore prepared with care; and cross-examination would unlikely be effective in further assessing the reliability of the reports.

However, it should be noted that proposed section 31(*g*), while extending the hearsay exceptions, would require that the evidence be "generally used and relied upon by the public or by persons in particular occupations"; accordingly, it was not intended to include all types of statistical evidence, gathered for any purpose, so long as it was compiled in accordance with principles accepted by experts in the particular field involved.[47]

Having discussed provisions designed to effect changes in the evidentiary law applicable generally to all litigation, whether in the form of an individual action or a class action, we now turn to consider provisions applicable only to class actions. As indicated, in the United States proponents of the use of statistical evidence in class actions have focused upon its utility in respect of aggregate awards of monetary relief. This is reflected by the fact that, with one exception,[48] all the sections in statutes or rules that have been drafted to deal with this problem[49] are restricted to the use of such evidence in that context.[50]

The exception to this general rule is Bill H.R. 5103, put forward by the

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[47] Compare s. 49(1) of the Draft Bill in this Report. A similar comment may be made with respect to draft s. 80, contained in New South Wales Law Reform Commission, *Report on the Rule Against Hearsay*, L.R.C. 29 (1978), Appendix A, Draft Evidence (Amendment) Bill, 1978, at 239. Draft s. 80 provides as follows:

> 80. A statement in a list, register, periodical, directory, timetable or other published compilation is admissible evidence of any fact asserted in it if the compilation is published for use by persons engaged in an occupation, or members of the public, or a section of it, and is used and relied upon by them.

It should also be noted that the "statement" to which reference is made in draft s. 80 must be "published": see *ibid.*, at 149, para. 4.8.1.

[48] See Small Business Judicial Access Act of 1979, United States Department of Justice, Office for Improvements in the Administration of Justice, Bill H.R. 5103, 96th Cong., 1st Sess. §§3004 and 3022(f) (1979) (hereinafter referred to as "O.I.A.J. Bill H.R. 5103").

[49] See Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, Title III, §301, 90 Stat. 1383, 15 U.S.C. §15d; House Comm. on Interstate and Foreign Commerce, *Report to Accompany H.R. 3816* (Federal Trade Commission Amendments of 1977), 95th Cong., 1st Sess. §20(d)(1)(A) and (B); and "Proposed Federal Consumer Class Action Legislation - II" (1975), 4 C.A.R. 342, §8(c).

[50] See, for example, Hart-Scott-Rodino Antitrust Improvements Act of 1976, *supra*, note 49, §15d, which reads as follows:

> 15d. In any [*parens patriae* action], in which there has been a determination that a defendant agreed to fix prices in violation of the Sherman Act damages may be proved and assessed in the aggregate by statistical or sampling methods, by the computation of illegal overcharges, or by such other reasonable system of estimating aggregate damages as the court in its discretion may permit without the necessity of separately proving the individual claim of, or amount of damage to, persons on whose behalf the suit was sought.

Office for Improvements in the Administration of Justice of the United States Department of Justice,[51] which would permit the use of statistical evidence to determine issues relating to a defendant's liability, as well as the amount or the extent of damages.[52] It should be noted, however, that, although O.I.A.J. Bill H.R. 5103 is broader than other class action provisions in this regard, the Bill is also narrower in another sense. Where a court makes use of statistical evidence in a "class compensatory" action between a private defendant and class members with claims in excess of $300, the O.I.A.J. provision specifies that any judgment based on such a determination is conditional.[53] The defendant is given a right to contest any such conditional determination before final judgment on the ground that it is erroneous.

This aspect of O.I.A.J. Bill H.R. 5103 is unsatisfactory for two reasons. First, if statistical evidence is so unreliable that there is a real likelihood of error, the court should not rely upon it in arriving at its decision. Secondly, a general right to relitigate a court's findings concerning liability would be wasteful of judicial time.

(e) Proposals for Reform in Ontario

From an examination of the use of statistical evidence in American class actions, and of existing and proposed statutory provisions respecting such evidence, the Commission has come to the conclusion that reliable statistical evidence can play a valuable role in reducing unnecessary administrative and evidentiary burdens for courts and parties in class actions. While it might be argued that an express provision authorizing the use of statistical evidence is not necessary with regard to class actions brought in the United States in the federal courts, since the combined effect of the case law and the United States Federal Evidence Rules seems to permit the introduction of such evidence, the case for an express statutory provision in Ontario is considerably stronger: the law in Ontario is uncertain and courts generally have adopted a more restrictive approach to the admissibility of statistical evidence, except in the competition law area, where detailed legislation governs.[54] Accordingly, a majority of the Commission[55] recommends the adoption in the proposed *Class Actions Act* of an express provision respecting the use of statistical

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[51] O.I.A.J. Bill H.R. 5103, *supra*, note 48.

[52] *Ibid.*, §3022(f). As we have seen in the preceding section, the utility of statistical evidence with respect to class action issues other than those relating to the assessment of aggregate awards has been demonstrated by a number of American cases that have made use of such evidence in the absence of an express statutory authorization: see *Rosado v. Wyman, supra*, note 33, and *Biechele v. Norfolk & Western Railway Co., supra*, note 32.

[53] O.I.A.J. Bill H.R. 5103, *supra*, note 48, §3022(f).

[54] See *supra*, this ch., sec. 1(b)(ii).

[55] One of the Commissioners, Mr. B.A. Percival, dissents from this recommendation for the following reasons: first, it will likely only ever be used by the plaintiff and therefore puts the defendant to a disadvantage; secondly, it results in a reverse onus, in that the defendant is then required to show that such evidence is wrong; and thirdly, it appears to represent a significant departure from the ordinary rules of evidence applicable in ordinary actions in Ontario.

evidence in class actions, and such a provision is included in our Draft Bill.[56] This provision represents a synthesis of the provisions relating to the admissibility of statistical evidence contained in the *Combines Investigation Act*[57] and in the United States Federal Evidence Rules.[58]

The Commission is of the view that the utilization of statistical evidence should not be impeded by artificial barriers imposed by the hearsay rule where the surrounding circumstances indicate that such evidence is reliable and persuasive. The statutory provision recommended by the Commission is designed to overcome generally the hearsay objection to the introduction of all types of statistical evidence, and, accordingly, provides that the court may admit statistical evidence, including sampling evidence, if such evidence was compiled in accordance with principles accepted by experts in the particular field.[59] Moreover, in view of the *Northern Electric*[60] case, we also recommend that the proposed Act should specifically authorize the admission of statistical evidence prepared or published under the authority of the Parliament of Canada or the legislature of a province or territory of Canada.[61]

These recommendations would permit not only the admission of statistical evidence that is generally available to the public, such as government data, market quotations, tabulations, lists, or directories,[62] but also the admission of statistical evidence that has been prepared by, or at the request of, a particular party to the litigation.[63] In either case, we recommend that the statistical evidence should not be admissible unless the party intending to introduce it has given reasonable notice to the party against whom it is intended to be introduced, together with a copy of such evidence.[64]

The Commission recognizes, however, that statistics compiled by, or at the request of, parties carry a risk of partisan bias or technical flaws, both in their design and in their execution by the individuals gathering the information through, for example, the use of leading questions. Moreover, statistical material prepared specifically for the particular litigation in order to help determine the entitlement of class members to monetary relief raises one issue of trustworthiness that is not present in data in which the participants have no interest. To the extent that class members know that the answers they give

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[56] See Draft Bill, s. 49.

[57] See *supra*, this ch., sec. 1(b)(ii).

[58] See *supra*, this ch., sec. 1(b)(i).

[59] See Draft Bill, s. 49(1). See, also, Combines Act Statistical Amendments, *supra*, note 28, s. 45.2, and U.S. Federal Evidence Rule 703, *supra*, note 17, although under the American Rule the statistics may only be admitted to form a basis for expert testimony.

[60] See *supra*, note 20.

[61] See Draft Bill, s. 49(2). See, also, Combines Act Statistical Amendments, *supra*, note 28, s. 45.1(1).

[62] See Draft Bill, s. 49(2).

[63] *Ibid.*, s. 49(1).

[64] *Ibid.*, s. 49(3). See, also, Combines Act Statistical Amendments, *supra*, note 28, s. 45.3(1).

will affect their monetary recoveries, they may have reason to falsify their beliefs or factual position. If such material is to carry any weight, it seems desirable that the survey should be conducted in a manner that would prevent the respondents from knowing that it is associated with the class action. It appears to be normal survey practice, however, for questions to be designed to conceal their purpose;[65] even interviewers ordinarily do not know why the survey is being carried out.[66]

If, after examination, the defendant believes that sufficient precautions have not been adopted, he should be entitled to argue that the statistical evidence should be excluded or that the judge should give it little weight.[67] The possibility that some statistical evidence is not reliable should not, however, provide a basis for the rejection of all such evidence in class actions. The Commission does not accept the notion that a party's self-interest in requesting or gathering the statistical evidence in question requires its inadmissibility as a matter of law. In this connection, reference should be made to statements made by the English Law Reform Committee in a 1966 report on hearsay:[68]

> *No statement is admissible if made by a person interested at a time when proceedings were pending or anticipated involving a dispute as to any fact which the statement might tend to establish.* This limitation goes to probative value only. We do not regard it as necessary to canvass the numerous cases upon this limitation save to point out that the change in the climate of judicial opinion upon the value of the hearsay rule is reflected in the wide effect given to this limitation in the early years after the passing of the Evidence Act 1938, and the narrower application of it in more recent cases. We recommend the abolition of this limitation, as did the Committee on Supreme Court Practice and Procedure in 1953 (Cmd. 8878, paragraph 274). A court is, we think, quite capable of assessing the weight to be attached to statements by whomsoever they are made.

On the other hand, statistics gathered by public bodies, and those derived from private sources that are nevertheless made available to and relied upon by the public or persons in particular occupations, are less likely to be subject to partisan distortion or mere flaws in execution, although there may be problems of general design. Moreover, the fact that such evidence is commonly relied upon outside the framework of the particular litigation provides some evidence of its reliability. Such evidence is readily available to both parties and, unlike the situation where a private survey has been undertaken or commissioned by one of the parties, the proponent is unlikely to have superior access to information concerning its compilation.

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[65] For example, respondents in a case like the *Arizona Bakery Products* case, *supra*, note 31, might be asked about their consumption of bakery products in the middle of a long line of questions about consumption of other food products that were not the subject of litigation: see *supra*, ch. 14, note 237, for a brief discussion of this case.

[66] See Zeisel, *supra*, note 1, at 336.

[67] See *Smith v. State of New York*, 268 N.Y.S. 2d 873 (1966), at 880:

> [W]e find it inconceivable that the persons interviewed . . . did not know the purpose behind the interview and the result sought to be obtained. Such a survey does not meet our standard of trustworthiness.

[68] Law Reform Committee, *Thirteenth Report (Hearsay Evidence in Civil Proceedings)* (Cmnd. 2964, 1966), at 9, para. 18 (emphasis in original).

For these reasons, we are of the view that both the notice obligations imposed upon the proponent of statistical evidence, and the right of the opponent of such evidence to require attendance of those involved in its compilation for purposes of cross-examination, should be greater in the case of privately prepared statistics than in the case of statistics made available on a more public basis.[69] While we have recommended that, in both instances, reasonable notice should be given to the party against whom it is intended to introduce the evidence,[70] in the case of statistical material prepared or published by the government, or statistics derived from sources generally used and relied upon by the public or by persons in particular occupations, we recommend that the notice need only specify the source of such evidence.[71] Moreover, it would seem counterproductive, in terms of manageability, to permit the opponent to compel the attendance of large numbers of government personnel or other persons involved in the compilation of such data, since it is unlikely that the gains in accuracy would outweigh the additional burdens placed upon the courts. In such cases, we recommend that it should be sufficient if the opponent is given the right to challenge the design of any particular aspect of such statistical material through cross-examination of any person under whose supervision the evidence was prepared.[72]

By way of contrast, we are of the view that, where the statistical evidence is not prepared or published by the government or derived from sources generally used and relied upon by the public or by persons in particular occupations, the notice to the party against whom it is intended to be introduced should specify the name and qualifications of every person who participated in the preparation of the statistical evidence and any additional documents prepared or used in the compilation of such evidence, and we so recommend.[73] In addition, any party who receives such a notice should be able to require the production of such additional documents for inspection, except documents that would reveal the identity of any persons responding to a survey who have not consented in writing to such revelation.[74] Finally, detailed investigation of even lower echelon personnel involved in the compilation of private data may be essential to identify partisan bias or technical flaws in execution. Accordingly, we recommend that any party against whom private statistical evidence is introduced should be able to require for the purpose of cross-examination the attendance of any person who participated in the preparation of the evidence.[75]

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[69] Compare the provisions of Draft Bill, s. 49(4) and (6), governing notice and cross-examination rights in the case of public and generally available data, with those of Draft Bill, s. 49(5) and (6), governing notice, production of documents, and cross-examination in the case of private studies. See, also, Combines Act Statistical Amendments, *supra*, note 28, s. 45.3, and U.S. Federal Evidence Rule 803(17), *supra*, note 17.

[70] See Draft Bill, s. 49(3).

[71] *Ibid.*, s. 49(4).

[72] *Ibid.*, s. 49(6). See, also, Combines Act Statistical Amendments, *supra*, note 28, s. 45.3(2).

[73] See Draft Bill, s. 49(5). See, also, Combines Act Statistical Amendments, *supra*, note 28, s. 45.3(1).

[74] See Draft Bill, s. 49(5).

[75] *Ibid.*, s. 49(6). See, also, Combines Act Statistical Amendments, *supra*, note 28, s. 45.3(3).

In addition to the fact that our proposed new statutory provision does not limit the type of statistical evidence that a court may admit as a matter of law, we are of the view that it should not restrict the use of such evidence to any particular purpose. The preoccupation of American commentators and legislators with the use of statistical evidence in aggregate assessments of monetary relief would appear to reflect the past reluctance of American courts to approve aggregate awards, rather than any inherent limitation upon the utility or reliability of statistical evidence. There does not appear to us to be any need to limit the scope of an Ontario provision in this manner. Accordingly, the language of our draft section is designed to permit satisfactory statistical evidence to be used at any stage of a class action, including the certification stage, where it might be of value as well as where notice is to be given,[76] where non-monetary issues of liability are to be determined, and where there is to be an assessment and distribution of monetary relief.[77]

Finally, the Commission rejects the principle in O.I.A.J. Bill H.R. 5103 that any judgment based upon statistical evidence ought to be conditional. Rather, we are of the opinion that, if a court decides that the statistical evidence sought to be admitted is sufficiently reliable to permit it to determine with reasonable accuracy the size of an aggregate award or the merits of any other issue, it should accept such evidence as a basis for a final judgment. If, on the other hand, a court is of the opinion that the statistical evidence leaves open a significant possibility for error, or is otherwise not persuasive, it should refuse to rely upon it, and insist upon more accurate means of proof.

2. SCOPE OR OPERATION OF THE PROPOSED *CLASS ACTIONS ACT*

(a) Applicability of Act to the Crown

In the past, the Commission has expressed the view that the Crown should be subject to the same rules of private law as is the ordinary citizen. For example, we recommended recently that the Crown should be bound by our proposed *Products Liability Act*[78] and by our proposed revised *Sale of Goods Act*.[79] As noted in our 1979 *Report on Sale of Goods*, the trend in Ontario is in favour of binding the Crown.[80] In the context of the proposed

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[76] The Commission has recommended previously that the court administering the class action should be authorized expressly to direct that the notice requirements of the proposed statute be met through individual notice to a sample portion of the class: see *supra*, ch. 13, sec. 4(a) and (c), and Draft Bill, ss. 16(3) and 18(3).

[77] The Commission has recommended previously that the auditing of claims upon a sampling basis should be expressly enumerated among the procedures that a court may authorize in the context of individual distribution of an aggregate award of monetary relief: see *supra*, ch. 14, sec. 3(c)(iii), and Draft Bill, s. 25(2).

[78] Ontario Law Reform Commission, *Report on Products Liability* (1980), at 125, and the proposed *Products Liability Act*, at 135, s. 2.

[79] Ontario Law Reform Commission, *Report on Sale of Goods*, Vol. 2 (1979), at 561-62, and the proposed revised *Sale of Goods Act*, Vol. 3 (1979), at 15, s. 2.3.

[80] *Ibid.*, at 561.

Class Actions Act, we see no reason to depart from this view. Accordingly, we recommend that the Crown should be bound by the proposed *Class Actions Act*, and our Draft Bill contains a provision to this effect.[81]

(b) Application of Act to Certain Types of Representative Action

We now turn to consider the types of class action that should be comprehended by the proposed *Class Actions Act.* As indicated previously, in this Report the Commission is concerned primarily with plaintiff class actions brought pursuant to Rule 75 of the Supreme Court of Ontario Rules of Practice.

However, as discussed in chapter 2, in addition to class actions brought pursuant to Rule 75, several statutes in Ontario authorize the commencement of representative-type actions. These statutes include the *Business Corporations Act*,[82] the *Condominium Act*,[83] the *Insurance Act*,[84] the *Landlord and Tenant Act*,[85] and the *Municipal Act.*[86] In chapter 2, we described certain provisions of two of these Acts, namely, those relating to derivative suits under the *Business Corporations Act* and those governing representative actions by a condominium corporation under the *Condominium Act.* The former type of action, while not a class action in the true sense of the term, nonetheless does contain representative-type elements.[87] Pursuant to the *Condominium Act*, a condominium corporation may commence an action on behalf of all occupants of the condominium for damage to the common elements or individual units.[88]

In addition to representative-type actions authorized by statute, there are certain actions that are required traditionally to be commenced in a representative capacity. The chief of these are creditors' actions to set aside a fraudulent conveyance, assignment, or preference.[89]

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[81] See Draft Bill, s. 54.

[82] R.S.O. 1980, c. 54, s. 97.

[83] R.S.O. 1980, c. 84, s. 14.

[84] R.S.O. 1980, c. 218, s. 226(1).

[85] R.S.O. 1980, c. 232, s. 119.

[86] R.S.O. 1980, c. 302, ss. 177(2) and 200. Regarding s. 34 of the *Mechanics' Lien Act*, R.S.O. 1980, c. 261, although Macklem and Bristow, *Mechanics' Liens in Canada* (3d ed., 1972), at 329, describe a mechanics' lien action as a "class action", it is clear, at law, that the section was intended to facilitate joinder of parties and that a judgment enforcing a mechanics' lien is binding only on parties to the action, and not upon persons who are not parties: *ibid.*, at 330. In fact, the Ministry of the Attorney General, in "Discussion Paper on the Draft Construction Lien Act" (November, 1980), s. 58, has deleted reference to "on behalf of himself and other lien claimants" contained at present in s. 34, and clarifies the procedure for joining persons as parties to the action.

[87] See *supra*, ch. 2, sec. 2(c)(iv)a.

[88] See *supra*, ch. 2, sec. 2(c)(iv)b.

[89] At common law, if a creditor is not a judgment creditor and he wishes to impeach a transaction of his debtor as a fraudulent conveyance, the creditor must bring the action

While many of the representative-type actions authorized by statute bear some resemblance to class actions brought under Rule 75, they are also different in certain respects. Moreover, they have been the subject of separate legislative provision. These actions are, therefore, beyond the scope of our Report, which, as indicated, deals generally with plaintiff class actions brought under Rule 75. With respect to actions traditionally required to be commenced in representative form, it is not clear whether such actions are, at present, subject to the strictures of Rule 75. Moreover, it is questionable whether some of the prerequisites of the proposed *Class Actions Act* or, indeed, of Rule 75, should apply to creditors' actions. The Commission is currently engaged in a study of creditors' suits in the context of its Enforcement of Judgment Debts project. In Part IV of our *Report on the Enforcement of Judgment Debts and Related Matters*, we shall consider whether and, if so, to what extent, such suits should be subject to the proposed *Class Actions Act.* In the meantime, we are of the view that such actions should not be comprehended by the Act.

Accordingly, we recommend that the proposed *Class Actions Act* should not apply to any representative action authorized by any other Act,[90] or to any action that, before the Act comes into force, was required to be brought by a person in a representative capacity.[91]

(c) Transitional Provisions

The final issue involving the scope or operation of the proposed *Class Actions Act* concerns the question of the retrospective or prospective operation of the Act. As a general rule, a statute that affects substantive rights does not operate retrospectively,[92] whereas one that effects mere procedural changes is presumed so to operate.[93] While the proposed *Class Actions Act* may be viewed as instituting new procedures for the commencement of class actions, it might also be seen as creating or imposing new substantive

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on behalf of himself and all other creditors of the debtor: see *Reese River Silver Mining Co. v. Attwell* (1869), L.R. 7 Eq. 347, 20 L.T. 163, and *Kroman's Electric v. Schultes*, [1970] 2 O.R. 548, at 553, 11 D.L.R. (3d) 425 (H.C.J.). If the creditor is a judgment creditor, it is not necessary, but is nonetheless permissible, that the action be commenced on behalf of all creditors: see *St. Gregor Mercantile Co. v. Halbach*, [1927] 1 D.L.R. 761, at 763-65, [1927] 1 W.W.R. 247 (Sask. K.B.). Moreover, in relation to the *Assignments and Preferences Act*, R.S.O. 1980, c. 32, and the *Bulk Sales Act,* R.S.O. 1980, c. 52, case law has stated that an action by a creditor to set aside a voidable transaction specified by those Acts should be brought on behalf of all creditors: see *Westinghouse Canada Limited v. Buchar* (1976), 9 O.R. (2d) 137, at 141-42, 59 D.L.R. (3d) 641 (C.A.), and *Interlake Tissue Mills Co. Ltd. v. George Everall Co. Limited* (1921), 50 O.L.R. 165, at 166-67, 64 D.L.R. 206 (H.C. Div.), respectively. Regarding creditors' actions under the *Fraudulent Conveyances Act*, R.S.O. 1980, c. 176, see *Prytula v. Prytula* (1980), 30 O.R. (2d) 324, 116 D.L.R. (3d) 474 (H.C.J.), and *Reicher v. Reicher* (1980), 20 R.F.L. (2d) 213 (Ont. Div. Ct.).

[90] See Draft Bill, s. 56(*b*).

[91] *Ibid.*, s. 56(*c*).

[92] See Edgar, *Craies on Statute Law* (7th ed., 1971), at 387 *et seq.*

[93] *Ibid.*, at 401-02.

obligations.[94] Accordingly, confusion might arise concerning the retrospective or prospective operation of the Act.

As the proposed Act effects major changes regarding the commencement and conduct of class actions in this Province – whether these changes be classified as procedural or substantive – we are of the view that it should not be retrospective in character; otherwise, the position of litigants who have commenced and have chosen to defend class actions on the basis of the present law might be prejudiced. Accordingly, we recommend that the proposed *Class Actions Act* should not apply to any action commenced before the Act comes into force.[95]

Recommendations

The Commission makes the following recommendations:

*1. The proposed *Class Actions Act* should contain an express provision respecting the use of statistical evidence in class actions.

2. The proposed *Class Actions Act* should provide that the court may admit statistical evidence, including sampling evidence, in an action under the Act, if such evidence was compiled in accordance with principles accepted by experts in the particular field.

3. Without restricting the generality of Recommendation 2, the proposed *Class Actions Act* should provide that statistical evidence prepared or published under the authority of the Parliament of Canada or the legislature of a province or territory of Canada may be admitted in evidence.

4. The proposed *Class Actions Act* should stipulate that statistical evidence under Recommendations 2 or 3 is not admissible unless the party intending to introduce it has given reasonable notice to the party against whom it is intended to be introduced, together with a copy of such evidence.

5. The notice obligations imposed upon the proponent of statistical evidence, and the right of the opponent of such evidence to require attendance of those involved in its compilation for purposes of cross-examination, should be greater in the case of privately prepared statistics than in the case of statistics made available on a more public basis. Accordingly, the proposed *Class Actions Act* should provide as follows:

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[94] The issue whether provisions are procedural or substantive in nature has been the focus of controversy in the United States: see, for example, Landers, "Of Legalized Blackmail and Legalized Theft: Consumer Class Actions and the Substance-Procedure Dilemma" (1974), 47 So. Calif. L. Rev. 842, and Ross, "Rule 23(b) Class Actions – A Matter of 'Practice and Procedures' or 'Substantive Right'?" (1978), 27 Emory L.J. 247.

[95] See Draft Bill, s. 56(*a*).

* One of the Commissioners, Mr. B.A. Percival, dissents from this recommendation. See *supra*, note 55.

(a) where evidence is of a kind mentioned in Recommendation 3, or is derived from sources generally used and relied upon by the public or by persons in particular occupations, any notice given under Recommendation 4 shall specify the source of such evidence;

(b) any party against whom any evidence of a kind mentioned in Recommendation 5(a) is introduced may require for the purpose of cross-examination the attendance of any person under whose supervision the evidence was prepared;

(c) except where Recommendation 5(a) applies, notice given under Recommendation 4 shall specify the name and qualifications of every person who participated in the preparation of the statistical evidence and shall specify whether any additional documents were prepared or used in the compilation of such evidence, and any party who receives such a notice may require that any such document be produced for inspection, except documents that would reveal the identity of any persons responding to a survey who have not consented in writing to such revelation; and

(d) any party against whom any evidence of a kind mentioned in Recommendation 5(c) is introduced may require for the purpose of cross-examination the attendance of any person who participated in the preparation of the evidence.

6. The proposed *Class Actions Act* should permit satisfactory statistical evidence to be used at any stage of a class action, including the certification stage, where it might be of value as well as where notice is to be given, where non-monetary issues of liability are to be determined, and where there is to be an assessment and distribution of monetary relief.

7. The Crown should be bound by the proposed *Class Actions Act.*

8. The proposed *Class Actions Act* should not apply to any representative action authorized by any other Act.

9. The proposed *Class Actions Act* should not apply to any action that, before the Act comes into force, was required to be brought by a person in a representative capacity.

10. The proposed *Class Actions Act* should not apply to any action commenced before the Act comes into force.

CHAIRMAN'S RESERVATIONS

It is apparent that the Commission's *Report on Class Actions* represents the culmination of a great deal of research undertaken over a considerable period of time. I agree that the present Ontario law of class actions, based, as it is, upon Rule 75 of the Supreme Court of Ontario Rules of Practice, is deficient in certain regards. I further agree that there is a need for an expanded Ontario class action procedure. However, I do not concur with all the recommendations of my colleagues, and, in case they may be of interest to those who have the responsibility of considering the Report with a view to its statutory implementation, I wish to state certain reservations. In light of the completeness of the Report, the reservations will be shortly expressed.

(a) While I support the introduction in Ontario of an expanded class action procedure, I have, in reaching this conclusion, derived only limited assistance from the material contained in Chapter 4, "Benefits and Costs of Class Actions". In my view the analysis of the concepts and arguments canvassed in the Chapter is not persuasive. Indeed, in assessing the Ontario position, I am concerned that we should be unduly guided by the American experience, so richly documented in the literature to which the Report refers.

(b) In Chapter 9, it is recommended that, as a prerequisite to certification, the proposed Ontario *Class Actions Act* should contain a two stage superiority test, the second stage comprising a cost-benefit analysis of the class action. The rationale given for this proposal is that, even though a court may find that a class action in a particular case is superior to other available methods for the fair and efficient resolution of the controversy, a class action, nevertheless, may "impose a tremendous burden upon the administration of justice in Ontario". I agree with this proposal and this reasoning. However, the Report also recommends that the onus of showing that the adverse effects of a class action are likely to outweigh any benefits to be derived therefrom should be on the defendant, rather than on the plaintiff. I do not concur with this analysis. The onus of establishing all other ingredients of the superiority test is placed, by the proposed Act, on the plaintiff, and, in my view, the cost-benefit analysis should be treated no differently. I consider that it should be the plaintiff who should have the onus of showing that the benefits of a class action are likely to outweigh any adverse effects to be derived therefrom.

(c) In Chapter 11, the Report discusses the conduct of class actions and recommends that a general management power should be conferred upon the court. I recognize that a class action may present manageability problems that are unlike those present in other forms of civil litigation, and I agree that a court should be empowered to make all appropriate orders necessary to ensure a fair and efficient resolution of the action. However, I dissent from this recommendation insofar as it proposes that a duty should be imposed upon a court to adopt an "activist" role. I do not believe that this departure from the adversary process, as known in Ontario, is required or justified.

(d) In Chapter 12 of the Report, the Commission recommends an "opt out" regime. Under this regime, members of a class are afforded an opportunity, but have no right, to withdraw from the litigation. Rather, the

Commission recommends that the proposed *Class Actions Act* should contain a provision giving a court a discretion in all cases to determine whether class members should be permitted to exclude themselves from a class action. I dissent from this recommendation. In my opinion, no person should, by compulsion of law, be required to participate in litigation, even as an absent class member. I am of the view that a class member should be entitled as of right, and with the very minimum of formality, to opt out of a class action.

(e) In Chapter 14 of the Report, the Commission recommends that the proposed *Class Actions Act* should authorize expressly the aggregate assessment of monetary relief. I agree that circumstances may arise where this method of assessment is appropriate. I support this recommendation and the procedures that are designed to distribute the award among individual class members. However, where a residue of an aggregate award remains after all feasible efforts at distribution to individual class members have been made, the Report recommends a discretionary *cy-près* distribution of the residue, or the forfeiture of the residue to the Crown. I share the view of my colleague, Barry A. Percival, Esq., Q.C., that the undistributed residue of an aggregate award should be returned to the defendant, and I join in his dissent.

(f) Chapter 17 of the Report deals with the question of costs. The Commission expresses the belief that the application of the existing costs rules to actions initiated under the proposed *Class Actions Act* will discourage class actions. To render the proposed class action procedure truly effective, the Commission recommends a special costs regime that transfers the burden of costs from the shoulders of the representative plaintiff. The special costs regime consists of two components. First, a no-way costs rule, whereby, in general, a court is precluded from awarding costs to either party at any stage of the proceedings, including any appeal.[1] Secondly, a rule that would permit a lawyer to make an agreement with a representative plaintiff stipulating for payment of fees and disbursements, as determined by the court, only in the event of success in the action.[2]

I do not agree with this recommendation. In my opinion, the special costs regime treats unequally the representative plaintiff and the defendant. Whether a class action succeeds or fails, a representative plaintiff, who has entered into an agreement of the type mentioned above, will incur no liability for costs and disbursements, either to the class lawyer or to the defendant. However, even if the defence succeeds, the defendant will always have to pay the costs of his lawyer. In *Naken v. General Motors of Canada Ltd.* (1978), 21 O.R. (2d) 780, 92 D.L.R. (3d) 100 (C.A.), in discussing the desirability of a new class action procedure, Arnup J.A., in delivering the judgment of the

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[1] The draft *Class Actions Act* contains three exceptions to this general rule: see s. 41(1) (*a*), (*b*), and (*c*).

[2] I appreciate that the amount of the lawyer's fees cannot be stipulated in the agreement, but is to be determined by the court. However, the fee is payable only in the event of success in the action, and the court is required to add an amount that is fair and reasonable compensation to the lawyer for the risk incurred by him in undertaking the action on the basis of payment only in the event of success. To my mind, therefore, the proposal of the Commission is a variant of the so-called "contingent fee", albeit as determined by the court.

Ontario Court of Appeal, adverted to the need that the procedure should contain appropriate safeguards for defendants, who "ought not to be subjected to expensive lawsuits by class action plaintiffs who cannot pay costs if they lose". Under the proposed *Class Actions Act*, the issue is not whether an unsuccessful class plaintiff can or cannot pay the defendant's costs. Rather, once the class action is allowed to proceed,[3] the proposed Act confers upon the class representative a statutory immunity against the payment of costs, not only at trial, but also on appeal. Can it not be asserted that, as to costs, the class representative has "nothing to lose" and the defendant "nothing to gain"?

No legislation in Ontario, proposed or adopted, has embraced the concept of the contingent fee. In 1975, a Special Committee of The Law Society of Upper Canada was appointed to consider the question of contingent fees in Ontario and to report and make recommendations to Convocation. In 1977, the Special Committee presented a Report, which was adopted, to Convocation. The Report recommended that the consideration of the question of contingent fees in Ontario should not be proceeded with at that time. In 1979, The Law Society of Upper Canada and the Ontario Branch of the Canadian Bar Association, in submissions to the Professional Organizations Committee, were opposed to contingent fees. In its Report, in 1980, the Committee recommended that there should be no relaxation of the current prohibition of contingent fees as a payment mechanism for legal services in Ontario. I appreciate, of course, that the submissions and the Report did not deal specifically with contingent fees and class actions, nor with the concept of court approved contingent fees. Nevertheless, it is in light of these circumstances, and in the absence of an in-depth and independent study on this matter, that I wish my reservations to be recorded.

So far as I am aware, on only one occasion has a Canadian court focused specifically on the question of costs in a class action. This occurred in *Cobbold v. Time Canada Ltd.* (1980), 28 O.R. (2d) 326, 109 D.L.R. (3d) 611 (H.C.J.), where the Ontario High Court considered submissions that there should be a different approach to the award of costs in a class action. In considering the submission, Carruthers J. stated:

> Those who are disposed to attach themselves to causes which can be made the subject-matter of a class action, should not overlook the fact that a class or representative action is simply a procedural mechanism. It allows, within the framework of one action, the determination of the claims of many people who seek the same, or similar relief, from a defendant. It does not provide any of the people with new substantive rights. It does not place any member of the class in a different position from the point of view of proving his or her case. In this respect each member of the class is in the same position as if he or she brought an action on their own. It is my opinion that the same considerations are to be applied to costs.
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> There may be instances where it may be deemed fair and equitable, that a successful defendant in a class action should not be awarded costs. I do not think, however, that there should be a one-way cost rule in any or every class action that does not succeed. Each case should be judged on its own circumstances. I do not

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[3] Section 1(*a*) of the draft *Class Actions Act* provides that " 'certify' means to permit an action to be maintained as a class action, but does not mean to approve the merits of the action except to the extent provided by clause 3(3)(*a*)".

> think that the present case is one in which the plaintiff should be granted a costs immunity. Accordingly, I leave my endorsement in the form in which it appears on the record. I will, however, grant leave to the plaintiff to have the matter of costs included in any appeal which may be taken from my judgment.

I agree, with respect, with these comments. I would depart from the present costs rule only to this extent. I would make it clear that the award of costs in class litigation is within the discretion of the judge, who should make such order as to costs as he deems fair and equitable in all the circumstances, with a right of appeal from such order without leave.

ACKNOWLEDGMENTS

The Commission's *Report on Class Actions* is the result of the efforts of many persons, whose assistance we now gratefully acknowledge. We are indebted to Mr. L. R. MacTavish, Q.C., former Senior Legislative Counsel, for his wise counsel and outstanding craftsmanship in the preparation of the Draft *Class Actions Act* that accompanies this Report.

The Commission wishes also to acknowledge the contribution of the many persons, both members of the Commission's legal staff and external research consultants, who did the research that forms the basis of this Report. To Professor J. K. Bankier of the Wayne State University Law School, and Professor W. A. Bogart of the Faculty of Law, University of Windsor, we extend particular thanks for their devotion and scholarship throughout the course of the project. We also thank Mr. R. Simon G. Chester for his invaluable assistance during the early stages of the project. We wish to express our appreciation of the efforts of Mr. Gregory Richards, who for three summers assisted the legal staff with class action research. The Commission was also fortunate to have the benefit of the views and long experience of Mr. B. W. Grossberg, former County Court Judge of the Judicial District of York. We are grateful to Professor D. N. Dewees of the Department of Political Economy, University of Toronto, and to Professors J. R. Prichard and M. J. Trebilcock, both of the Faculty of Law, University of Toronto, for their research paper "An Economic Analysis of Class Actions" and for their advice and assistance at various stages of the project. We also extend our thanks to Mr. S. T. Goudge and Mr. Raj Anand, who prepared a working paper on the law of costs, and to Professor J. B. Laskin of the Faculty of Law, University of Toronto, for his research memorandum dealing with certain constitutional issues.

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During the course of the project, the Commission consulted with class action experts in jurisdictions outside Ontario. M. Yves Lauzon, Directeur général of the Fonds d'Aide Aux Recours Collectifs, and Me Marie-José Longtin, of the Quebec Ministry of Justice, were most helpful in providing us with information concerning the experience in Quebec under the class action legislation recently enacted in that jurisdiction. We were also given generous assistance by a number of persons in the United States. We thank Mr. Paul M. Bernstein, of New York, N.Y.; Mr. Stephen Berry, formerly of the Office for Improvements in the Administration of Justice of the United States Department of Justice; Mr. Richard O. Cunningham, Chairman of a committee of the Litigation Section of the American Bar Association formed to propose draft class action legislation; Professor B. S. DuVal, Jr., of the American Bar Foundation Project; Professor G. W. Foster, Jr., of the University of Wisconsin Law School; Mr. Beverley C. Moore, Jr., of Washington, D.C.; Professor Jane M. Picker, of the Cleveland Marshall College of Law, Cleveland State University; and Chief Judge J. B. Weinstein, of the United States District Court, Eastern District of New York. In particular, the

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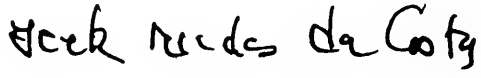
The final preparation of this Report for publication has been an exceptionally burdensome task, and we wish to express our sincere appreciation to the administrative and support staff of the Commission for their splendid assistance.

The Project on Class Actions has involved the expenditure of considerable time and effort in research, writing, and editing. The bulk of the workload has fallen on the internal legal staff. We wish, therefore, to acknowledge the commitment and efforts of the Commission's Legal Research Officers: Mr. L.M. Fox, Mr. E. Gertner, Ms. P.M. Gibson, Ms. A.M. Merritt, and Mr. M.A. Springman. We also wish to give special thanks to Ms. M.P. Richardson, Counsel to the Commission, for her tireless dedication at all stages in bringing this project to a successful conclusion.

All of which is respectfully submitted,



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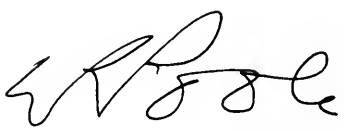

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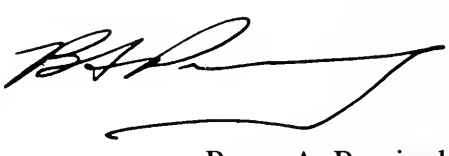

Barry A. Percival
Commissioner

March 31, 1982

APPENDIX 1

DRAFT BILL

Class Actions Act

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An Act respecting Class Actions

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:

Interpretation

1. In this Act,

(*a*) "certify" means to permit an action to be maintained as a class action, but does not mean to approve the merits of the action except to the extent provided by clause 3(3)(*a*);

(*b*) "class action" means an action certified as a class action by an order made under this Act;

(*c*) "court" means the Supreme Court or a county or district court;

(*d*) "discovery" means examination for discovery or production and inspection of documents under the rules of court, and "to discover" has a corresponding meaning.

COMMENCEMENT OF ACTION

Commencement of action

2.–(1) One or more members of a class of persons may commence an action on behalf of the members of the class.

Representative plaintiff

(2) A person who commences an action under subsection (1) shall be known as the representative plaintiff.

Notice to Attorney General

(3) The representative plaintiff shall give notice in writing to the Attorney General of the commencement of the action.

CERTIFICATION

Application for certification order

3.–(1) After the commencement of an action under section 2, the representative plaintiff may apply to the court for an order certifying the action as a class action.

Time for application

(2) An application under subsection (1) shall be commenced within 90 days from the day upon which the defendant filed his appearance or from the defendant's default in so doing.

Prerequisites to certification order

(3) Subject to section 6, the court shall certify the action as a class action if the court finds that,

(*a*) the action is brought in good faith and there is a reasonable possibility that material questions of fact and law common to the class will be resolved at trial in favour of the class;

(*b*) the class is numerous;

(*c*) there are questions of fact or law common to the class;

(*d*) a class action would be superior to other available methods for the fair and efficient resolution of the controversy; and

(*e*) the representative plaintiff would fairly and adequately protect the interests of the class.

Superiority of class action

4. In determining whether a class action would be superior to other available methods for the fair and efficient resolution of the controversy, the court shall consider all relevant matters including,

(*a*) whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members;

(*b*) whether a significant number of members of the class have a valid interest in individually controlling the prosecution of separate actions;

(*c*) whether the class action would involve claims that are or have been the subject of any other proceedings;

(*d*) whether other means of resolving the claims are less practicable or less efficient; and

(*e*) whether the administration of the class action would create greater difficulties than those likely to be experienced if relief were sought by other practicable means.

Adequacy of representation

5. In determining whether the representative plaintiff would fairly and adequately protect the interests of the class, the court may consider whether provision has been made for competent legal representation that is adequate for the protection of the interests of the class.

Costs and benefits of class action

6.—(1) Where the court finds that the conditions set out in subsection 3(3) have been satisfied, it may nevertheless refuse to certify the action as a class action if, in the opinion of the court, the adverse effects of the proceedings upon the class, the courts or the public would outweigh the benefits to the class, the courts or the public that might be secured if the action were certified.

Onus

(2) The onus of establishing that an action should not be certified as a class action by reason of subsection (1) is upon the person so contending.

Order not to be refused

7. The court shall not refuse to certify an action as a class action on the ground only that the relief claimed,

(*a*) includes a claim for damages that would require individual assessment in subsequent proceedings involving the defendant; or

(*b*) arises out of or relates to separate contracts between members of the class and the defendant.

Evidence on application for certification order

8.–(1) Upon an application under section 3, the representative plaintiff and the defendant shall serve and file one or more affidavits setting forth the material facts upon which each intends to rely and in which each deposes that he knows of no fact material to the application that has not been disclosed.

Examination of deponent

(2) The maker of such an affidavit may be examined thereon in accordance with the rules of court as to discovery.

Contents of certification order

9.–(1) An order certifying an action as a class action shall,

(*a*) describe the class on whose behalf the action is brought;

(*b*) describe the nature of the claim made on behalf of the members of the class and specify the relief claimed;

(*c*) define the questions of fact or law common to the class; and

(*d*) state whether some or all members of the class will be permitted to exclude themselves from the class action and specify a date before which such members may exclude themselves.

Amendment of order

(2) The court may at any time amend an order certifying an action as a class action.

Interpretation

(3) An order certifying an action as a class action includes an order amending such an order.

Where class action refused

10.–(1) Where the court refuses to certify an action as a class action, the court may order that the style of cause and the pleadings be amended to eliminate any reference to the representation of members of the class, and the action may proceed accordingly.

Decertification

(2) Subject to sections 13 and 14, where it appears to the court that the conditions in subsection 3(3) are no longer satisfied, the court shall set aside the order certifying the action as a class action, and may make amendments to the proceedings to eliminate any reference to the representation of members of the class, and the action may proceed accordingly.

COMMON AND INDIVIDUAL QUESTIONS

Common and individual proceedings

11.–(1) In a class action, questions that are common to the class shall be determined in common proceedings, and questions that require the participation of individual members of the class shall be determined in individual proceedings under section 25 or 31.

Separate judgments

(2) Where there are common proceedings and individual proceedings, the court may give separate judgments in respect of each.

INTERVENTION

Intervention by class members

12.–(1) In order to ensure the fair and adequate protection of the interests of the class or for any other appropriate reason, the court, at any time in an action under this Act, may permit one or more members of the class to intervene upon such terms and conditions, including costs, as it considers proper.

Intervention by Attorney General

(2) At any time in an action under this Act, the court may invite the Attorney General, or the Attorney General may apply to the court, to intervene concerning any aspect of the action that raises a matter of public interest, including the matters raised in clauses 3(3)(*d*) and (*e*) and in section 6.

SUBSTITUTION OF REPRESENTATIVE PLAINTIFF

Change of representative plaintiff

13. At any time in an action under this Act, the court may, upon finding that the representative plaintiff does not fairly and adequately protect the interests of the class, or will not do so, make an order substituting another member of the class as the representative plaintiff.

Attorney General as representative plaintiff

14. At any time in an action under this Act, if it is in the public interest that the Attorney General act as representative plaintiff and either the representative plaintiff does not or will not fairly and adequately protect the interests of the class or the representative plaintiff consents,

(*a*) the court may invite the Attorney General to be the representative plaintiff; or

(*b*) the Attorney General may apply to the court for permission to be the representative plaintiff.

POWERS OF COURT

Powers of court

15. The court, upon the application of a party or upon its own motion, may make any order under this Act and all appropriate orders determining the course of the action for the purpose of ensuring the fair and expeditious determination thereof, including an order to prevent undue repetition or complication in the action, and the court may impose such terms and conditions upon the parties as it considers proper.

NOTICE

Notice of class action

16.–(1) After certifying an action as a class action, the court may order that notice be given to members of the class informing them of the class action.

Criteria

(2) In deciding whether to order notice under this section, the court shall consider all relevant matters including,

(*a*) the cost of giving notice;

(*b*) the nature of the relief sought;

(*c*) whether the court has determined that some or all of the members of the class may exclude themselves from the class action;

(*d*) the size of the claims of the members of the class; and

(*e*) the total amount of monetary relief claimed in the action.

Method of notice

(3) Where the court orders notice under this section, notice shall be given by advertisement, publication, posting or distribution, unless the court, having regard to the matters set out in subsection (2), orders notice by some other method, including individual notice to a sample portion of the class, and the court may order notice to be given in different ways to various members of the class.

Contents of notice

(4) Notice under this section shall include,

(*a*) a brief description of the class action including the relief claimed;

(*b*) a brief description of the class;

(*c*) a statement that a member of the class will be bound by any judgment on the questions common to the class;

(*d*) if the court has determined that individual members may exclude themselves from the class action, a statement to that effect, indicating how and by what date the members may exclude themselves and the consequences to the members if they exclude themselves or fail to do so;

(*e*) a statement that a member of the class may apply to intervene in the class action;

(*f*) the name and address of the representative plaintiff to which further inquiries may be directed; and

(*g*) any other information that the court considers proper.

Notice following judgment for class on common questions

17.–(1) Where the court gives judgment for the class on the questions common to the class and individual proceedings under section 25 or 31 are necessary, the court shall order that notice of the judgment be given to the members of the class whose participation in such individual proceedings is required.

Method of notice

(2) Unless the court orders otherwise, notice under this section shall be given by mail to members of the class who are identifiable through reasonable means in terms of expense and effort, and by advertisement, publication, posting or distribution to members who are not so identifiable.

Contents of notice

(3) Such notice shall include,

(*a*) a statement informing the members of the class that a judgment on the questions common to the class has been given and that they may be entitled to relief thereunder;

(*b*) a statement informing the members of the class of the steps necessary to establish their claims;

(*c*) a warning that, upon failure to take such steps, the member will not be entitled to relief except by leave of the court;

(*d*) the name and address of the representative plaintiff to which further inquiries may be directed; and

(*e*) any other information that the court considers proper.

General notice

18.–(1) At any time in an action under this Act, the court may order such notice as it considers necessary to protect the interests of the members of the class and the parties or otherwise

for the fair conduct of the action, but the court may not order notice under this section for the purpose of requiring members of the class to take active measures to include themselves in the class action before a determination of the questions common to the class.

Criteria

(2) In deciding whether to order notice under this section, the court shall consider all relevant matters including,

(*a*) the cost of giving notice;

(*b*) the nature of the relief sought;

(*c*) the size of the claims of the members of the class; and

(*d*) the total amount of monetary relief claimed in the action.

Method of notice

(3) Where the court orders notice under this section, notice shall be given by advertisement, publication, posting or distribution, unless the court, having regard to the matters set out in subsection (2), orders notice by some other method, including individual notice to a sample portion of the class, and the court may order notice to be given in different ways to various members of the class.

Cost of general notice

(4) The court may determine by whom and to what extent the cost of notice ordered under this section shall be paid, and may apportion the cost between the parties.

Court approval of notice

19. Notice under section 16, 17 or 18 shall not be given unless the court approves its contents.

EXCLUSION

Exclusion

20.–(1) The court shall determine whether some or all of the members of the class should be permitted to exclude themselves from a class action.

Criteria

(2) In determining whether members of the class should be permitted to exclude themselves from the class action, the court shall consider all relevant matters including,

(*a*) whether as a practical matter members of the class who exclude themselves would be affected by the judgment;

(*b*) whether the claims of the members of the class are so substantial as to justify independent litigation;

(*c*) whether there is a likelihood that a significant number of members of the class would desire to exclude themselves;

(*d*) the cost of notice necessary to inform members of the class of the class action and of their right to exclude themselves; and

(*e*) the desirability of achieving judicial economy, consistent decisions, and a broad binding effect of the judgment on the questions common to the class.

Notice of exclusion

(3) Where the court has determined that some or all of the members of the class may exclude themselves, they may do so by informing the court in writing by a date specified by the court of their desire to be so excluded.

Exclusion and judgment

(4) The names of persons who have excluded themselves from the class action shall be set out in any judgment on the questions common to the class or in any settlement of the action under this Act.

Effect of exclusion

(5) A person who has excluded himself from the class action is no longer a member of the class for any purpose and is not entitled to any relief awarded in the class action.

DISCOVERY

Rights of discovery and examination before determination of common questions

21. Before the questions common to the class are decided,

(*a*) the representative plaintiff and the defendant have the same rights of discovery against each other that are available in ordinary actions;

(*b*) after discovery of the representative plaintiff, the defendant may apply to the court to discover other members of the class;

(*c*) in deciding whether to grant leave to discover other members of the class, the court shall consider all relevant matters including,

(i) the stage of the class proceedings and the issues to be determined at that stage,

(ii) whether discovery is necessary for the purpose of the defence on the issues,

(iii) the approximate monetary value of the individual claims, where monetary relief is claimed, and

(iv) whether discovery will result in oppression, undue annoyance, burden or expense for the members of the class;

(*d*) a member of the class is subject to the same sanctions under the rules of court as any party in an action for failure to submit to discovery, except that the court shall not exclude a member of the class from recovery unless it determines that no other sanction is adequate to protect the interest of the defendant; and

(*e*) the defendant shall not by subpoena require a member of the class other than the representative plaintiff to attend to be examined for the purpose of using his evidence upon any motion or application except by leave of the court, and in deciding whether to grant such leave, clauses (*b*), (*c*) and (*d*) apply *mutatis mutandis*.

MONETARY RELIEF

Aggregate assessment

22. In a class action where,

(*a*) monetary relief is claimed on behalf of the members of the class;

(*b*) no questions of fact or law other than the assessment of monetary relief remain to be determined in order to establish the liability of the defendant to some or all members of the class; and

(*c*) the total amount of the defendant's liability, or part thereof, to some or all of the members of the class can be assessed without proof by the individual members of the class with the same degree of accuracy as in an ordinary action,

the court shall determine the aggregate amount of the defendant's liability and give judgment accordingly.

Direct distribution by defendant

23.—(1) Where the court gives judgment under section 22 and the identity of any members of the class and the amount of monetary relief to which each is entitled can be determined from records in the possession, custody or control of the defendant, the court may direct the defendant to make such determinations and, subject to section 45, to distribute the amounts so determined to each class member directly by any means authorized by the court.

Payment into court

(2) Where the court gives judgment under section 22 but no order is made under subsection (1), the court shall order the defendant to pay into court or some other appropriate depository the total amount of the liability so determined.

Direct distribution by court

24. Where the court gives judgment under section 22 but does not order the defendant to make a direct distribution under

subsection 23(1), and the identity of any members of the class and the amount of monetary relief to which each is entitled can be determined without requiring evidence from each such class member, the court shall so determine the amount to which each such member of the class is entitled, and order that the amounts so determined be distributed directly to such class members by any means authorized by the court.

Individual distribution

25.—(1) Except where an order is made under section 23, 24 or subsection 26(1), the court shall afford the members of the class a reasonable opportunity to claim their respective shares of a judgment given under section 22.

Establishing claims

(2) For the purpose of establishing the claims of members of the class, the court shall authorize such procedures as will minimize the burden imposed upon the class members, including the use of standardized proof of claim forms designed to elicit the information necessary to establish and verify such claims, the reception of affidavit, documentary, or other written evidence, and the auditing of claims upon a sampling or other basis.

Average distribution

26.—(1) Where the court gives judgment under section 22 but the circumstances render impracticable the determination of the members of the class who are entitled to share in the judgment or the exact share of the judgment that should be allocated to particular class members, the court may order that the members of the class are entitled to share in such judgment on an average or proportional basis if it is satisfied that failure to so order would deny recovery to a substantial number of class members.

Exclusion from average distribution

(2) Where the court makes an order under this section, the court shall afford members of the class who apply to be excluded from an order under subsection (1) a reasonable opportunity to establish their claims under section 25, and the amount so established and awarded to such class members shall be deducted from the amounts to be distributed under subsection (1).

Cy-près distribution

27.—(1) The court may order that any money that has not been distributed under section 23, 24, 25 or 26 be applied in a manner that may reasonably be expected to benefit some or all of the members of the class, and for this purpose the court may order that any such money be returned to the defendant upon such terms and conditions respecting its use as the court considers proper.

Idem

(2) The fact that an order made under this section may benefit persons who are not members of the class or who have already received monetary relief under section 23, 24, 25 or 26 is not a bar to the making of such an order if the court is satisfied that a reasonable number of members of the class who would not otherwise receive monetary relief will benefit thereby.

Forfeiture to Crown or return to defendant

28. The court may order that any money that has not been distributed under section 23, 24, 25, 26 or 27 be forfeited to the Crown or returned unconditionally to the defendant as the court considers proper.

Notice to Attorney General

29. Before the court makes an order under section 27 or 28 or approves a settlement containing as one of its terms provision for the application of undistributed money in a manner provided for by section 27, notice shall be given to the Attorney General who may make submissions respecting the propriety of such an order.

Individual assessments

30. Where the total amount of the liability of the defendant or part thereof to some or all of the members of the class cannot be determined under section 22 or where the amount of monetary relief to which each member of the class is entitled cannot be determined as a common question, the court shall order individual proceedings for the assessment of monetary relief under section 31.

INDIVIDUAL PROCEEDINGS

Individual proceedings

31.–(1) Where the court determines the common questions in favour of the class, and subsequent proceedings that require participation by members of the class and the defendant are necessary to determine individual questions, the court may,

(*a*) conduct such proceedings alone or with other judges of the court;

(*b*) appoint one or more persons to conduct such proceedings by way of inquiry and report; or

(*c*) on consent of the defendant, and of the representative plaintiff on behalf of the class, order such proceedings and give directions for the conduct thereof.

Directions

(2) The court may give such directions as may be necessary for the conduct of proceedings under clause (1)(*a*) or (*b*), including any directions to achieve conformity of proceedings, and in giving such directions the court shall order the simplest, least expensive and most expeditious method of determining the issues that is consistent with justice to the members of the class, the defendant and the representative plaintiff, including dispensing with any procedure that it considers unnecessary and directing special procedures regarding such matters as discovery, admission of evidence and means of proof.

Confirmation of report

(3) The person who has conducted proceedings under clause (1)(*b*) shall record his findings in a report which is not effective until confirmed by the court.

Judgment on individual questions

(4) The determination of any individual questions under this section constitutes a judgment.

Failure to claim share

32. Where the court makes an order under section 25 concerning the manner in which a member of the class may claim his share of a judgment or where individual proceedings are required under section 31, a member of the class who fails to take such further action as is necessary to establish his entitlement to the relief claimed within the time prescribed by the court is not entitled to proceed under section 25 or 31 except by leave of the court.

JUDGMENTS

Payment of judgment

33.—(1) The court may direct that any amount awarded under section 22 or 31 shall be paid either in a lump sum, whether forthwith or within such period as the court may fix, or in such instalments and upon such terms and conditions as the court considers proper.

Stay of execution

(2) The court shall supervise, and may stay for a reasonable period, the execution or distribution of the whole or any part of a judgment upon such terms and conditions as it considers proper.

Binding effect of judgment on common questions

34.—(1) Judgment on the questions common to the class is not binding upon persons who have excluded themselves from the class action or upon the defendant in any subsequent proceeding brought by a person who has excluded himself.

Idem

(2) Judgment on the questions common to the class binds every member of the class who has not excluded himself from the class action to the extent only that the judgment determines the questions common to the class that are defined in the order certifying the action as a class action and that relate to the claim described and the relief specified in the order.

Contents of judgment on common questions

(3) A judgment on the questions common to the class shall,

(*a*) name or describe the members of the class who are bound by the judgment;

(*b*) describe the nature of the claim made on behalf of the members of the class and specify the relief awarded; and

(*c*) define the questions of fact or law common to the class.

LIMITATIONS

Statute of limitations

35.—(1) Any limitation period applicable to an action under this Act is suspended for the members of the class upon the

commencement of the action and resumes running against a member of a class,

(*a*) upon his exclusion from the class action under section 20;

(*b*) upon his exclusion from the class description by reason of an order made under subsection 9(2);

(*c*) except as to any party, upon an order made under section 10; or

(*d*) upon dismissal of the action without an adjudication on the merits.

Interpretation

(2) For the purpose of subsection (1), the limitation period resumes running as soon as all rights of appeal have been exhausted or all appeals have been disposed of, as the case may be.

SETTLEMENT, ETC.

Settlement, etc. of action

36.–(1) An action commenced under this Act shall not be settled, discontinued or dismissed for want of prosecution without the approval of the court and upon such terms and conditions, including notice or otherwise, as the court considers proper.

Cost of notice

(2) Unless the court orders otherwise, the cost of any notice ordered under this section may be determined by agreement of the parties.

APPEALS

Appeal of order certifying or refusing to certify action as a class action

37.–(1) An appeal lies to the Divisional Court from an order certifying or refusing to certify an action as a class action or setting aside an order certifying the action as a class action.

Appeal of amending order with leave

(2) With leave of a judge of the High Court, an appeal lies to the Divisional Court from an order amending an order certifying an action as a class action.

Rights of appeal of class members

(3) For the purpose of subsection (1) or (2), if the representative plaintiff does not appeal or if he abandons his appeal, any member of the class may apply to a judge of the High Court for leave to appeal on behalf of the class.

Appeal of judgment on common questions

38.–(1) An appeal lies to the Court of Appeal from a judgment on the questions common to the class.

Rights of appeal of class members

(2) For the purpose of subsection (1), if the representative plaintiff does not appeal or if he abandons his appeal, any member of the class may apply to the Court of Appeal for leave to appeal on behalf of the class.

Appeal of individual questions

39.—(1) Where judgment has been given under section 22 and shares of the judgment have been determined under sections 23 to 26 or where judgment has been given under section 31, any member of the class who has been awarded more than $1,000 may appeal to the Divisional Court and any member of the class who has been awarded $1,000 or less may apply to the Divisional Court for leave to appeal.

Rights of appeal of representative plaintiff

(2) Where judgment has been given under section 22 and shares of the judgment have been determined under sections 23 to 26, the representative plaintiff may appeal to the Divisional Court an award to a member of the class for more than $1,000, and may apply to the Divisional Court for leave to appeal an award to a member of the class for $1,000 or less.

Rights of appeal of defendant

(3) Where judgment has been given under section 31, the defendant may appeal to the Divisional Court an award to a member of the class for more than $1,000, and may apply to the Divisional Court for leave to appeal an award to a member of the class for $1,000 or less.

Interpretation

(4) For the purpose of this section, leave to appeal shall be granted only where there has been a substantial miscarriage of justice.

Appeal of *cy-près* and forfeit orders

40. Where an order has been made under section 27 or 28, the representative plaintiff, the defendant or the Attorney General may appeal to the Court of Appeal.

COSTS AND FEES

Costs
R.S.O. 1980, c. 223

41.—(1) Notwithstanding section 80 of the *Judicature Act*, but subject to section 46, costs shall not be awarded to any party to an action under this Act at any stage of the proceedings, including any appeal, except,

(*a*) on an application for an order certifying the action as a class action, where the court is of the opinion that it would be unjust to deprive the successful party of costs;

(*b*) in the event of vexatious, frivolous or abusive conduct on the part of any party; or

(*c*) on an interlocutory motion.

Security for costs

(2) Subject to section 46, security for costs shall not be required in an action commenced under this Act.

Class members not liable for costs

(3) Subject to section 46, the members of the class, other than the representative plaintiff, are not liable for costs.

Agreements regarding payment for fees and disbursements
R.S.O. 1980, c. 498
R.S.O. 1897, c. 327

42.–(1) Notwithstanding section 30 of the *Solicitors Act* and *An Act respecting Champerty*, a solicitor may make an agreement in writing with the representative plaintiff regarding payment for fees and disbursements in respect of an action commenced under this Act stipulating for payment only in the event of success in the action.

Interpretation

(2) For the purpose of this section, success in the action includes a judgment in favour of some or all members of the class on the questions of fact or law common to such members or a settlement that benefits any member of the class.

Amount of payment not to be stipulated

(3) An agreement under this section shall not stipulate the amount of the payment either by a gross sum, commission, percentage, salary or otherwise, and any such stipulation is void.

Court to determine payment for fees and disbursements

(4) Where the representative plaintiff and his solicitor have made an agreement under this section, the court that has given judgment on the common questions or has approved a settlement shall, at the conclusion of any individual proceedings or at such other time and upon such terms and conditions as the court considers proper,

(*a*) determine the amount of the solicitor's fees and, in addition thereto, an amount that is fair and reasonable compensation to the solicitor for the risk incurred by him in undertaking the action on a basis of payment only in the event of success; and

(*b*) determine the amount of disbursements to which the solicitor is entitled, including interest thereon calculated on the balance of disbursements incurred as totalled at the end of each six month period following the date of the agreement,

and shall order that such amounts be paid to the solicitor in accordance with section 45.

Fees and disbursements where no agreement

43. Where the representative plaintiff and his solicitor do not have an agreement under section 42, the court that has given judgment on the common questions or has approved a settlement shall, at the conclusion of any individual proceedings or at such other time and upon such terms and conditions as the court considers proper, determine the amount of fees and disbursements payable by the representative plaintiff to the solicitor and shall order that such amount be paid to the solicitor.

Determination by judge

44. Determinations under section 42 or 43 shall be made by a judge.

Payment of solicitor out of fund

45.—(1) The amount ordered to be paid to the solicitor under section 42 or 43 constitutes a first charge, payable on a proportional basis, against any amount awarded to the members of the class.

Payment into court

(2) Where individual proceedings are ordered under section 31 and the defendant is ordered to pay an amount of monetary relief to a class member, that amount shall be paid into court and shall not be paid to the class member.

Payment out of court

(3) Upon the determination of the amount of the solicitor's payment under section 42 or 43 and payment thereof, the court shall order the distribution of the amounts to which individual class members are entitled.

Costs of individual proceedings R.S.O. 1980, c. 397

46. In any proceedings under section 31,

(*a*) the costs provisions of the rules made under the *Provincial Court (Civil Division) Project Act* apply to claims of $3,000 or less and their applicability shall not be restricted to The Municipality of Metropolitan Toronto; and

R.S.O. 1980, c. 223

(*b*) the costs provisions of the *Judicature Act* and of the rules of court apply to all other claims.

Costs of distributing aggregate award

47. Where judgment is given under section 22, the court may order that the costs of distribution, including costs of notice and payment of an appropriate fee to the person administering the distribution, be paid out of the proceeds of the judgment.

Offer to settle

48.—(1) The representative plaintiff or the defendant may serve on the other party an offer to settle an action under this Act.

Idem

(2) After service of the offer, the court, upon application, shall determine whether the offer is reasonable.

Idem

(3) Where the court has determined that the offer is reasonable but it is not accepted, the court may award costs against the offeree,

(*a*) if the representative plaintiff is the offeree and the amount ultimately awarded to the members of the class is less than the amount offered; or

(*b*) if the defendant is the offeree and the amount ultimately awarded to the members of the class is greater than the amount offered.

Statistical, including sampling, evidence

49.–(1) The court may admit statistical, including sampling, evidence in an action under this Act if such evidence was compiled in accordance with principles accepted by experts in the particular field.

Idem

(2) Without restricting the generality of subsection (1), a collection, compilation, analysis, abstract or other record or report of statistical information prepared or published under the authority of the Parliament of Canada or the legislature of a province or territory of Canada may be admitted in evidence.

Notice

(3) Statistical, including sampling, evidence under subsection (1) or (2) is not admissible unless the party intending to introduce it has given reasonable notice to the party against whom it is intended to be introduced together with a copy of such evidence.

Source

(4) Where evidence is of a kind mentioned in subsection (2) or is derived from market quotations, tabulations, lists, directories or other compilations generally used and relied upon by the public or by persons in particular occupations, any notice given under subsection (3) shall specify the source of such evidence.

Details of sources to be disclosed

(5) Except where subsection (4) applies, notice given under subsection (3) shall specify the name and qualifications of every person who participated in the preparation of the statistical or sampling evidence and shall specify whether any additional documents were prepared or used in the compilation of such evidence, and any party who receives such a notice may require that any such document be produced for inspection, except documents that would reveal the identity of any persons responding to a survey who have not consented in writing to such disclosure.

Cross-examination

(6) Any party against whom any evidence of a kind mentioned in subsection (4) is introduced may require for the purpose of cross-examination the attendance of any person under whose supervision the evidence was prepared, and any party against whom any evidence of a kind mentioned in subsection (5) is introduced may require for the purpose of cross-examination the attendance of any person who participated in the preparation of the evidence.

No jury

50. An action under this Act shall not be tried by a judge with a jury.

Presiding judge

51.–(1) In an action under this Act, the same judge shall preside at all motions and interlocutory proceedings before the trial of the questions common to the class and, subject to section 31 and unless the parties and the judge otherwise agree, another

judge shall preside at the trial of the questions common to the class and thereafter.

Where judge unable to continue

(2) If, at any time in an action under this Act, the presiding judge is unable for any reason to continue, another judge shall be designated in accordance with the practice of the court.

Where s.121 of R.S.O. 1980, c. 223 does not apply

(3) In an action under this Act, section 121 of the *Judicature Act* does not apply unless the Chief Justice of the High Court orders otherwise.

Rules of court apply

52. The rules of court, except to the extent that they are inconsistent with this Act and the rules made under section 53, apply to actions under this Act.

Rules may be made R.S.O. 1980, c. 223

53. The Rules Committee may make any rules under the *Judicature Act* necessary or advisable to carry out effectively the intent and purpose of this Act.

Crown bound

54. The Crown is bound by this Act.

Commencement

55. This Act comes into force on the day of , 198 .

Application of Act

56. This Act does not apply to,

(*a*) any action commenced before this Act comes into force;

(*b*) any action brought by a person in a representative capacity that is authorized by any other Act; or

(*c*) any action that before this Act comes into force was required to be brought by a person in a representative capacity.

Short title

57. The short title of this Act is the *Class Actions Act, 198* .

APPENDIX 2

Federal Rules of Civil Procedure for the United States District Courts Rule 23 (1966)*

Rule 23. Class Actions

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable

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effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

Date Due

OCT 23 1982 4-30 AM	
OCT 24 1982 4-30 PM	
OCT 25 1982 7-00 PM	
OCT 26 1982 11-00 PM	
OCT 27 1982 3-00 PM	
OCT 27 1982 7-00 PM	
NOV 23 1982 9 PM	
MAY 17 1984 3-00 PM	
APR 23 1987 3-00 PM	
APR 14 1988	
MAR 12 1989 3-30 PM	

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